

















REPORTS OF CASES  
DECIDED IN THE  
COURT OF APPEAL,

DURING PARTS OF THE YEARS 1884 & 1885.

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REPORTED UNDER THE AUTHORITY OF  
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Agriculture.



JUDGES  
OF THE  
COURT OF APPEAL

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THE HON. JOHN HAWKINS HAGARTY, C. J. O.

“ “ GEORGE WILLIAM BURTON, J. A.

“ “ CHRISTOPHER SALMON PATTERSON, J. A.

“ “ JOSEPH CURRAN MORRISON, J. A.

“ “ FEATHERSTON OSLER, J. A.

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THE HON. OLIVER MOWAT.

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### MEMORANDUM.

ON the 6th day of May, 1884, The Honourable JOHN HAWKINS HAGARTY, Chief Justice of the Queen's Bench, was appointed Chief Justice of this Court with the title of Chief Justice of Ontario, in the room of The Honourable JOHN GODFREY SPRAGGE, deceased.



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# ONTARIO APPEAL REPORTS.

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GODDARD ET AL. V. COULSON ET AL.

*Mechanics' lien.*

The plaintiffs contracted with one C. for the execution of the stone work upon certain buildings which C. had contracted to build. C. never completed the work, but during the progress thereof was paid in good faith the full value of the work actually done by him on the building before he abandoned the contract.

*Held* (reversing the judgment of the County Court), that a sub-contractor with C. could not enforce payment of his claim to the extent of ten per cent. of the contract price under the Act R. S. O. ch. 120, sec. 11, as amended by 41 Vict. ch. 17, sec. 1.

*Quære*, as to the meaning and effect of that clause.

APPEAL from the County Court of the County of York.

The action was by John Goddard and James Nobbs against Duncan Coulson, Thomas Lownsbrough, and Thomas Crittenden.

The statement of claim set forth that the defendants Coulson and Lownsbrough were trustees of the marriage settlement of one John Turner, and his wife now deceased, and as such trustees were the owners of the lands sought to be charged with the plaintiffs' claim: that in the Autumn of the year 1879, the defendants Coulson and Lownsbrough contracted with the defendant Crittenden, for the doing by him of certain work in the erection of certain buildings for them, as such trustees, on the said property, and that the defendant Crittenden undertook to carry out, and commenced, and continued to perform said contract: that the plaintiffs were employed by the defendant Crittenden to supply and furnish certain materials

for said work. The materials supplied and furnished by the said plaintiffs, for the said Crittenden were as follow :

|       |                |   |          |          |
|-------|----------------|---|----------|----------|
| 1879. | November.      | To cut stone as per contract—North house .. | \$241 00 |          |
| "     | "              | " " " " " " —South " ..                     | 179 00   |          |
| "     | "              | To 12 feet window heads, at 40 cents .....  | 4 80     |          |
|       |                |   |          | <hr/>    |
|       |                |   |          | \$424 80 |
| 1879. | November 15th. | By cash.....                                | \$ 90 00 |          |
| "     | " 29th.        | " .....                                     | 100 00   |          |
| "     | December 3rd.  | " .....                                     | 50 00    |          |
|       |                |   |          | <hr/>    |
|       |                |   |          | \$240 00 |
|       |                |   |          | <hr/>    |
|       |                |   |          | \$184 80 |

That such materials were used in the construction of said buildings, and that delivery of the same was completed on the 6th January, 1880 : that the plaintiffs on the 10th January, 1880, registered a lien in the Registry Office for the City of Toronto, under "The Mechanics' Lien Act," and of *lis pendens* in the same office on the 16th of the said month of January, against said property, and that 30 days had not elapsed between the furnishing of said materials and the registering of said lien and *lis pendens* : that \$184.80 and interest thereon from the 13th January, 1880, was the amount due plaintiffs for such materials : that no dispute had arisen as between plaintiffs and defendant Crittenden as to the amount due plaintiffs under said lien, and that judgment was signed against Crittenden on the 8th May, 1880, in default of appearance : that the defendants Coulson and Lownsborough admitted having \$190 or thereabouts in their hands for the payment and satisfaction of liens registered against the said property, and that there was no valid or subsisting lien existing against the same except that of the plaintiffs, and that the plaintiffs claimed a lien under "The Mechanics' Lien Acts" for the price of said materials upon the estate or interest of the defendants, the trustees, in the said buildings, and the land occupied thereby or enjoyed therewith.

The statement of defence by the defendants Coulson and Lownsborough set forth :

"That prior to the time of service of notice by the plaintiffs (sub-contractors) of the lien claimed by them



on the premises referred to in the statement of claim, the defendant Crittenden had abandoned his contract for the erection of the said buildings, and had been paid all moneys due or owing to him thereon, and at the time of such service there were no moneys owing to him upon or in respect of which the alleged lien of plaintiffs could attach. That the delivery to the defendant Crittenden of the materials mentioned in the plaintiffs' statement of claim was not made within thirty days next previous to the filing of the plaintiffs' lien, and the plaintiffs did not notify the defendants Coulson and Lownsborough within thirty days next after the furnishing of said materials that they claimed a lien for the price of such, or that they had an unpaid account or demand against the said Crittenden; and that the plaintiffs were sub-contractors, and did not within ten days after delivery of said materials serve the defendants Coulson and Lownsborough with notice in writing of their claim, and the defendants paid Crittenden all moneys owing to him under such contract before they were served with any notice in writing by the plaintiffs of their claim; they also denied having any moneys in their hands applicable to the payment of the plaintiffs."

The action came on for trial before Boyd, Co. J., when evidence was given shewing that the defendants Coulson and Lownsborough had not any money in their hands applicable to pay Crittenden; when the learned Judge directed "that this case be referred to the Clerk of this Court, to ascertain what liens are valid and subsisting against the property, and to take the accounts and report to this Court thereon. It is also directed that defendants Coulson and Lownsborough do pay into Court, forthwith, the sum of \$189.70. It is further directed that defendants pay no costs."

The defendants subsequently, on the 2nd of January, 1883, moved in term for an order "calling upon the plaintiffs to shew cause why the verdict entered for the plaintiffs should not be set aside or reduced, or a verdict entered for the defendants Coulson and Lownsborough, or for a new trial between the parties, on the ground that the verdict was contrary to law and evidence, and the weight of evidence;

that no notice was served on the defendants Coulson and Lownsbrough to entitle the plaintiffs to a lien on the lands in question for the penalty of ten per cent of the contract price, as required by the Mechanics' Lien Acts and amendments thereto." No motion was made on behalf of plaintiffs.

No written judgment was delivered, and the following is the note of the learned Judge, made when the motion was argued, 10th January, 1883:

"Judgment for \$135, with costs of action—not costs of this motion."

The defendants Coulson and Lownsbrough thereupon appealed to this Court, and the appeal came on for argument on the 22nd of May, 1884.\*

*Ritchie*, for the appellants.

*Snelling*, for the respondents.

The arguments sufficiently appear in the judgment.

May 26th, 1884. HAGARTY, C. J. O.—The defendants are trustees of Mrs. Turner, and own the land on which two buildings were erected by one Crittenden, under a written contract, not produced, between them. Mr. Turner was the active manager of the matter, the trustees not personally interfering.

Plaintiffs contracted with Crittenden to do certain stonework on each of the houses.

In the middle of December, 1879, Crittenden was unable to go on with the work in consequence of pecuniary difficulties.

We cannot understand what were the provisions of his contract—neither party would produce it. We cannot tell whether it provided for keeping back any percentage or not.

Crittenden was constantly pressing for money, and we think it clear, from the evidence, that up to his abandoning

the contract he was fully paid for all the work actually done by him. This appears from his own evidence and Mr. Turner's, and no attempt was made to impugn their testimony, and it cost several hundreds of dollars over and above his contract to finish the houses.

The plaintiffs claim a lien under the Statutes, for about \$135, or to the extent of ten per cent. of the contract.

The Court below fixed the amount at that sum.

Several questions were raised as to the sufficiency of the registration of plaintiffs' lien and as to whether it was filed in time.

In the view we entertain on the main question of liability, it may not be necessary to consider any other matter.

If Crittenden was paid in full for all his work and materials up to his abandonment of this contract, we must see our way very clearly under the then existing law to make the owner still liable for his non-payment of his sub-contractors.

The Acts then in force were the R. S. O. ch. 120 and the amending Act of 1878, c. 17.

In the first Statute, sec. 6, it is provided that "the lien shall not in any case attach upon such estate and interest, so as to make the same or the owner thereof liable to the payment of any greater sum than the sum payable by the owner to the contractor."

Sec. 11 declares that all payments made in good faith by the owner to the contractor \* \* before notice in writing by the person claiming the lien has been given to such owner, &c., of the claim of such person \* \* shall operate as a discharge *pro tanto* of the lien created by this Act, &c., but the section shall not apply to payments made to defeat the lien.

This sec. 11, by the Act of 1878, 41 Vict. ch. 17, is made to read, "all payments up to 90 per cent. of the price to be paid for the work, machinery, or materials \* \* made in good faith by the owner," &c., following the rest of clause 11. Sec. 2, "the said lien shall, in addition to all other rights and remedies given by the said Act, also

operate as a charge to the extent of ten per cent. of the price to be paid as aforesaid by such owner up to 10 days after the completion of the work in respect of which such lien exists, or of the delivery of the materials, and no longer, unless notice in writing be given, as hereinbefore provided."

The argument chiefly turned on these amendments.

On the evidence before us there was no money to be paid by the owner for any work done or materials provided.

Everything was fully paid for in good faith by the owner, and there was no completion of the work.

The Legislature, by the Act of 1882, ch. 15, (which does not apply to this case), seems to have considered further legislation necessary. Sec. 4, as to wages, declares that the lien shall to the extent of ten per cent. of the price to be paid to the contractor, have priority over all other liens under the said Act and over any claims by the owner against the contractor for or in consequence of the failure of the latter to complete his contract. Sec. 5. In case of there being a contract, if any person other than the contractor has performed labour or supplied materials on or for the execution of the contract, the owner shall, in the absence of stipulation to the contrary, be entitled to retain for a period of thirty days after the completion of the contract ten per cent. of the price to be paid to the contractor.

An Act passed last Session, 47 Vict. ch. 18, sec. 1, declares that no agreement hereafter made shall be held to deprive any one otherwise entitled to a lien under the said Act or amendments thereof, and not a party to such agreement, of the benefit of such a lien, but such lien shall attach notwithstanding such agreement.

It seems clear that the plaintiffs cannot recover unless they can establish, under the two first Acts, that even if the owner had paid for everything in full he is still liable to the extent of ten per cent. of the whole contract price for work done or to be done.

We must require very express legislation—clear beyond reasonable doubt or question—to establish a claim so startling in its result.

We have nothing here to shew whether the owner agreed to reserve ten per cent.

There is no imputation of bad faith in or any design to defeat the claims of sub-contractors.

The Act originally giving the lien declares in sec. 6, which has never been altered or repealed, that the owner should not be made liable to pay any greater sum than what was payable by him to his contractor.

We cannot see that sections 1 and 2, of the amending Act of 1878, necessarily in a case like that before us affect that honest principle. The ten per cent. can be literally held liable as a part of the "price to be paid by the owner," provided such a portion remains or is in existence, but we should not, we think, extend it by any necessary implication to ten per cent. on a price for work which has never been done, and which to the great injury of the owner his contractor wrongfully refused to do.

It is evident that Mr. Turner and his legal adviser, apparently thought at one time that plaintiffs' contention as to the ten per cent. was well founded. But nothing was done on such supposition to bind them to act thereon.

On the whole I think the appeal must be allowed.

PATTERSON, J. A.—I agree that this appeal should be allowed, and I have only a few words to add to what has been said by his lordship the Chief Justice.

The Statute 41 Vict. cap. 17, substitutes an amended section 11, for the section of that number found in ch. 120 of the R. S. O. By this amended section all payments up to 90 per cent of *the price to be paid* for the work, machinery, or materials, as defined by section three, made in good faith by the owner to the contractor, or by the contractor to the sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing of the claim of the person claiming the lien, shall operate as a



discharge *pro tanto* of the lien created by the Act; and by section 2 of ch. 17, the lien shall operate as a charge to the extent of ten per cent. of the *price to be paid as aforesaid by such owner* up to ten days after the completion of the work in respect of which such lien exists, or of the delivery of the materials, and no longer, unless notice in writing is given.

The first question is, what is "*the price to be paid,*" ten per cent. of which may be charged?

The second part of the section defines it as something that is to be paid *by the owner*, and it is evidently the price to be paid by the owner to the person with whom immediately he contracts. One does not readily grasp the exact meaning of the provision respecting the ninety per cent. A man furnishing materials, as these plaintiffs have done to the value of \$179, for use in a house the price to be paid for which was \$1,350, has a lien for his \$179 on the house, &c. But if I correctly read section 11 as saying that every *bonâ fide* payment, up to 90 per cent. of the \$1,350, shall operate as a discharge *pro tanto* of the \$179 lien, I am at a loss to find in the enactment a very clear protection of the lien holder.

But looking only at the second part of the section, which gives a lien on ten per cent. of the "*price to be paid as aforesaid by such owner,*" I do not think it can fairly be said to do more than to charge, in favour of the mechanic, &c., ten per cent. of the money which becomes payable by the owner to the principal contractor.

It has not been shewn in evidence in this case, with much certainty, what was the price to be paid by the owner; for although it appears that there was a written contract, the plaintiffs, on whom rested the burden of establishing their lien, have not proved the terms of the contract. But, gathering its nature as best we can from such evidence as there is, we are driven to the conclusion that the contract price agreed upon never became the price to be paid, because the contractor failed to do what was necessary to earn it, or to earn more than he was in good faith actually paid, that amount being under 90 per cent.

This view of the meaning of section 11 seems to be in accordance with what may be inferred to have been the understanding of the law by the Legislature when passing the Act of 1882, 45 Vic. cap. 15, sec. 4, which gave a lien for wages priority over a claim by the owner against the contractor for or in consequence of the failure of the latter to complete his contract.

It may not be safe to place very much stress on a subsequent statute as evidence of what the law at an earlier period was. See remarks of Bayley, J., in *Winstone v. Linn*, 1 B. & C. at p. 468; of Bramwell B., in *Holme v. Hammond*, L. R. 7 Ex. at p. 232; and of Sir Montague Smith, in *Mollwo v. Court of Wards*, L. R. 4 P. C. at p. 437, respecting statutes which were cited in those cases to shew what the Legislature had considered to be the previous state of the law. And I am not prepared to commit myself to the opinion that even under the Act of 1882 the owner can be compelled to pay to the workmen money for which he never became indebted to the contractor. The lien under that Act is expressed, as in the earlier one, to be on ten per cent. of the price *to be paid* to the contractor, and it may be found when it becomes necessary to decide the point, that section 4 only postpones, in favour of the lien, a cross demand against a defaulting contractor. However this may be, we can refer to section 4, as at all events consistent with the view we take of section 11.

That view, as I may shortly recapitulate it, is that when by my contract I am to pay money only on a certain event, the Legislature has not gone the length of saying that I am to pay it although the event never happens.

MORRISON, J. A., concurred.

## HARRIS V. MOORE ET AL.

*Oral evidence to explain agreement—New trial—Discretion of Judge.*

The plaintiffs agreed to sell to the defendants a waterwheel, "and place the same in position" for \$150, but the defendants refused payment upon the ground that the wheel had not been properly placed, and did not in fact, perform the work stipulated for. The jury found for the defendants, and the Judge of the County Court granted a new trial—costs to abide the event. On appeal this Court refused to interfere with the discretion of the Judge of the Court below, considering that the term "placed in position" was so indefinite that the defendant was at liberty to shew what was meant thereby; the writing, by such parol evidence not being added to or varied, but only rendered intelligible.

THIS was an appeal from a judgment of the Judge of the County Court of the county of Grey, setting aside a verdict rendered by the jury for the plaintiff, and granting a new trial, with costs to abide the event.

The plaintiff's claim was against the defendants as executors of Robert Kirk, deceased, and also in their personal capacities, for \$180, for goods sold, work done; materials for the same provided, and for interest, the particulars of which were as follow:

|  |          |
|--|----------|
| 1881, July 5. To 1 Piece of Shaft 2 ft. 9 in. long, weight 116 |          |
| lbs., @ 6c .....   | 6 96     |
| To 20 feet Gate Shaft, 88 lbs., @ 6c .....                     | 5 28     |
| 1 Pair Mitre Wheels .....                                      | 4 50     |
| 1 36-inch Canadian Turbine put in .....                        | 150 00   |
| Teaming men and tools to C. Wood .....                         | 1 00     |
| Nov. 4. Altering upper works of mill .....                     | 9 00     |
|  | <hr/>    |
|  | \$176 74 |
| Interest .....   | 3 26     |
|  | <hr/>    |
|  | \$180 00 |

The other facts of the case, including the contract signed by the parties, appear in the judgment.

The appeal came on to be heard before this Court on the 22nd of May, 1884.\*

*Falconbridge*, for the appellants. The oral testimony given on the part of the defendants at the trial to prove that the written agreement did not contain the whole

\*Present.—HAGARTY, C.J.O., PATTERSON and MORRISON, JJ.A.



agreement between the parties, should not have been withdrawn from the jury ; and the jury having found for the plaintiff as to part and for the defendants as to part, their verdict should not be disturbed, as they were the proper judges of the facts, and there is sufficient evidence to support their finding ; besides there was sufficient evidence independent of that withdrawn by the Judge from the jury to support the verdict.

*Creasor*, Q. C., for the respondents. Here it cannot be alleged that there is not any question that the plaintiff is entitled to recover, and unless the Court sees that such is the fact the verdict for the defendant will not be disturbed. The rule in this case was granted on the ground that the verdict was contrary to law and evidence, and the weight of evidence, and that it was perverse ; not that improper evidence had been received.

*Hyde v Gooderham*, 6 C. P. 539 ; *Spring v. Cockburn*, 19 C. P. 63 ; *Chamberlin v. Smith*, 21 U. C. R. 103 ; *Malpas v. The London and South Western Railway Co.*, L. R. 1 C. P. 336 ; *Gould v. Hamilton*, 5 Gr. 192 ; *Bridges v. North London R. W. Co.*, L. R. 7 H. L. 230 ; *Knox v. Cleveland*, 8 C. P. 176 ; *Kelly v. Sherlock*, L. R. 1 Q. B. 686 ; *Mason v. Brunskill*, 15 U. C. R. 300 ; *Brown v. Malpas*, 7 C. P. 185 ; *Miller v. Ball*, 19 C. P. 447 ; *Richard v. Rose*, 23 L. J. Ex. 3 ; *Anson on Contracts*, 232 ; *Benjamin on Sales*, 2nd ed., 154, 178, were referred to.

May 28th, 1884. The judgment of the Court was delivered by

PATTERSON, J. A.—This is an appeal from an order made in the County Court of the county of Grey, granting a new trial.

The plaintiff Harris brings the action to recover the value of a water wheel furnished by him and his partner Barber to the defendants and for work done by them in putting that wheel into the defendants' mill, and some other small charges. The plaintiff's particulars contain six items, amounting in all to \$176.74, the principal item being "1 36-inch Canadian Turbine put in \$150."

The defendants in their statement of defence formally dispute the plaintiff's claim, and also set up a counter claim against the plaintiff and Barber, which is thus stated:

"The defendants, by way of counter claim, say that the plaintiff and one Charles Barber mentioned in the statement of claim, agreed to put in position in the defendants' mill a 36-inch Canadian Turbine Wheel, and that owing to the negligent, unskilful, and unworkmanlike manner in which the work in and about the placing of said wheel was done, the said wheel would not work as guaranteed, and the defendants have sustained much loss and damage."

"The defendants further say, that the plaintiff and the said Charles Barber agreed to put the wheel in the said mill at least two feet lower than the old wheel, so as to give the said mill a greater capacity for cutting, which the said plaintiff and the said Charles Barber failed to do, thereby causing much loss and damage to the defendants.

"The defendants claim from the plaintiff and the said Charles Barber, the sum of two hundred dollars for damages sustained as mentioned above."

There had been a written agreement between the plaintiff's firm and the defendants, who are executors of one Kirk, which reads thus:

"MEAFORD June 17th, 1881."

"Memorandum of agreement between the executors of the estate of the late Robert Kirk and Barber & Harris, of Meaford, shewing that the executors have this day purchased a 36" Canadian Turbine, second-hand, of Barber & Harris, which is guaranteed to them as a good article and in thorough repair, and with the mill in good repair otherwise to be capable of cutting at the rate of 2000 feet per hour of good pine or hemlock; the price of said wheel is to be \$100, say one hundred dollars.

Barber & Harris further agree to place the wheel in position at the mill and do the necessary mill-wrighting for the following additional sum, viz:

Put in the wheel and attach to the present machinery, including millwright's board, \$50; say fifty dollars. The said executors agree to furnish the necessary timber and lumber required free of charge to the millwright in charge of the work, and to do all the cartage from Collingwood.

Payment to be by note at three months, with the privilege of renewal for three months additional. They to pay second discount.

Executors of Kirk Estate, { THOS. MOORE,  
ROBT. GORDON,  
BARBER & HARRIS."

There appears to have been a great deal of contest and much conflicting evidence at the trial respecting the mode in which the wheel was put into the mill, and the work it was able to do, and the trial resulted in a verdict for the plaintiffs for \$18.78 only, the jury adding that the defendants were not to pay for the wheel.

Against this verdict the plaintiffs moved, and obtained the order which is the subject of this appeal.

Evidence had been offered at the trial on behalf of the defendants to shew that at the time of making the agreement it had been expressly agreed that part of the work which the plaintiffs undertook was the setting of their wheel some two feet lower than the wheel which it replaced, for which purpose some excavation of the bed of the stream was required, and that the plaintiff and his then partner were to do that. This evidence was objected to on the part of the plaintiff. The learned Judge received it, subject to the objection, but afterwards withdrew it from the jury, as it is stated, which means, I suppose, that he told the jury not to regard it.

The views acted upon by the learned Judge in granting the new trial are noted by him in his judgment, which I shall read. He said:

"In this case I think the contract attempted to be set up by the defendants was not a collateral one, but was an effort to vary a written contract by oral testimony; the evidence was not clear and certain; it was strongly contradicted, and its admission would lead to the very evils that the rule as to the rejection of oral evidence was intended to prevent.

The agreement may be said to contain two contracts, one to furnish the wheel, the other to put it into position. The defendants have had all the benefit of the wheel, and have continued to use, but now want to get it without

paying for it; that is the effect of the verdict, and there was no evidence to support such a verdict.

"If the wheel was not properly set, the defendants would be entitled to such a reduction as would enable them to have it properly set, but would not now be enabled to refuse payment or to repudiate the whole contract.

"New trial granted. Costs to abide the event."

It would be a very unusual case in which this Court would interfere with the grant of a new trial, which is, in a case like this, an act of discretion. The reasons given by the learned Judge make it clear that his discretion was wisely exercised.

From the terms of the agreement it appears that the defendants bought a specific second-hand wheel for \$100, taking a guaranty as to its capabilities; and agreed to pay \$50 for putting it in position, with some other work. The apparent finding of the jury is that the damages recoverable on the guaranty, or for some breach of the \$50 agreement, are enough to balance the whole price of the wheel and the value of whatever work was done by the plaintiffs under the contract. It is not easy to imagine a more proper case for a new trial. It is one of the cases in which a jury may, with great advantage, be asked to find specifically upon questions submitted to them by the Judge, which we venture to think may have been a consideration in the mind of the learned Judge when he made the order. But while we have to treat the case before us as one in which it would be wrong to disturb the order, we cannot say that the defendants who appeal were not justified in bringing the matter before this Court. They impugn the ruling of the learned Judge respecting the admission of the evidence concerning the deepening of the bed of the stream, and contend that to send them down to a new trial, at which that ruling should be repeated, would be to do them an injustice, and possibly to make an appeal and a third trial necessary.

We agree with the defendants in this respect. We do not think the evidence objectionable. As we gather from



the report of the shorthand writer, the evidence was offered for one of two purposes: either to shew an agreement independent of or in addition to the written one, that the excavation should be done in consideration of teaming from Collingwood to Meaford, and back from Meaford to Collingwood; or (without setting up a separate agreement) to shew what the parties to the written agreement understood at the time of making it to be included in the promise to put the wheel in position. There is, no doubt, difficulty in attempting to maintain the former of these alternatives created by the mention of teaming in the writing, notwithstanding that that is only cartage one way; and, for my own part, I should hesitate before concluding that the contract could be classed with those upheld in such cases as *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756; and others cited in this Court in *Mason v. Scott*, 22 Gr. 592. and in the Q. B. Div. in *LaRoche v. O'Hagan*, 1 O. R. 300.

But there does not appear to be any sound objection to proving by oral evidence what was meant by the agreement "to place the wheel in position at the mill." The phrase does not explain itself. It is necessary to go outside of the document even to ascertain what mill is meant, and having learned that from oral information, we still require to know what placing the wheel *in position* means. The words "in position" are indefinite. They may have had one of three meanings, viz: in the position the vendors think proper; in the position the vendees direct; or in a position mutually agreed upon; and we do not violate any rule of evidence in receiving an oral explanation of what both parties meant. The writing is not thereby added to or varied. It is merely made intelligible; and the question of fact, what was understood and intended to be included in the undertaking to place the wheel in position, will be decided by the jury, or by the Judge if he is trying the issues of fact, with the aid of the evidence given.

An instance of the reception of parol evidence in similar circumstances to these will be found in *Sweet v. Lee*, 3 M.

& G. 452. I read a passage from p. 460 of the report. "The plaintiff's counsel then asked the person by whom this memorandum was produced, and who was present when the agreement was made and the memorandum written, to explain the terms used by the parties. For the defendant it was submitted that parol evidence in explanation of a written instrument was inadmissible. The learned Judge (Coltman, J.) ruled that the terms of the memorandum being incomplete and unintelligible, *per se*, it was competent to the plaintiff to shew by parol evidence in what sense those terms had been used, that evidence not being inconsistent with such terms."

In *Birch v. Depeyster*, 1 Stark. 210, Sir Vicary Gibbs, C. J., received evidence of conversation at the time of the making of a written agreement to explain what was understood by the word "privilege" as used in that writing.

These cases support the opinion we intimated during the argument touching the admissibility of the evidence.

Many cases may be referred to in which the right to prove, by parol, facts and circumstances necessary to identify the subject matter of a written contract, by explaining the meaning of terms which are ambiguous or unintelligible without explanation, is discussed. One of the later cases of this class is *Newell v. Radford*, L. R. 3 C. P. 52; but one more in point at present is *Macdonald v. Longbottom*, 1 E. & E. 977, because the import of the term "your wool" was proved by evidence of conversations preceding the writing of the memorandum.

With this intimation of our opinion, for the assistance of the learned Judge in the Court below, we dismiss the appeal, but without costs.

*Appeal dismissed, without costs.*

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## McKINDSEY V. ARMSTRONG.

*Trust for sale and to pay beneficiary—Attachments of proceeds.*

E. A. conveyed real and personal estate to one B. upon trust, to convert the same into money, and pay debts, &c.; and as to any balance remaining, upon trust to pay the same to R. A., son of E. A., or if B. should see fit he might invest the same in the purchase of a homestead, and convey the same to R. A. in fee.

*Held*, reversing the judgment of the County Court, that there was no debt due from B. to R. A. which could be garnished by the creditors of R. A.

THIS was an appeal from an order made in Chambers by the Judge of the County Court of the County of Halton, ordering the garnishee to pay to the judgment creditor the sum of \$250.67.

Upon the return of the garnishing summons, it being suggested that the debt sought to be attached belonged to one John Pollard Roper, he was called upon, and appeared to maintain his claim to such debt.

This appeal was brought by the judgment debtor Robert Armstrong, and Roper, jointly.

The original parties to the proceedings were Ellen McKindsey (judgment creditor), Robert Armstrong (judgment debtor), and John Brain (garnishee).

The evidence taken before the Court below shewed that in January, 1881, the late Edward Armstrong had, by an indenture of that date conveyed to the garnishee certain real and personal property, "Upon the trusts, nevertheless, and to and for the intents and purposes hereinafter declared of and concerning the same, that is to say: upon trust, in the first place, with all convenient speed, to sell and convert the said lands and personal property into money, either by public auction or private contract." The proceeds to be applied in payment of debts and legacies.

"And as to the balance remaining in the hands of the said trustee (if any), upon trust to pay the same to Robert Armstrong, a son of the said Edward Armstrong, or if the said party of the second part shall see fit, he may invest the same in the purchase of a homestead, and convey the said homestead to the said Robert Armstrong, his heirs and assigns, for ever."

Brain was examined before the County Judge, and stated as follows: "I sold the land, \* \* \* and the chattels were sold at auction. Edward Armstrong is dead; he died in January last. After paying the legacies I will have in my hands about \$1,000 to pay to R. Armstrong, less my charges. I have paid all the claims I have heard of, or that have been presented to me. The amount received from the sale of the farm was \$5,000; from the chattels \$471.83, or thereabouts. I thought of buying Robert a homestead."

After hearing counsel for the respective parties, an order was made by the learned Judge on the 29th of May, 1883, directing the garnishee forthwith to pay to the judgment creditor the sum above mentioned, and in default of payment, execution to issue for the amount.

Amongst the grounds of appeal against such order one was, that "There was no debt due from the garnishee to the judgment debtor, inasmuch as by the terms of the trust deed, under which the moneys attached had come to the hands of the garnishee, there was nothing due or accruing due by him to the judgment debtor, unless and until he had decided not to invest the trust moneys in his hands in the purchase of a homestead for the judgment debtor."

The appeal came on to be argued on the 27th day of May, 1884,\*

*Aylesworth*, for the appellants.

*Beaty*, Q. C., for the respondent.

*Hamer v. Giles*, 11 Ch. D. 942; *Hirsch v. Coates*, 18 C. B. 757; *Arthur v. Clough*, 17 U. C. R. 302, were referred to.

May 28th, 1884. The judgment of the Court was delivered by

PATTERSON, J. A.—We think it clear that there was no garnishable debt due from Brain, the trustee, to Robert Armstrong the *cestui que* trust.

Edward Armstrong conveyed land and chattels to Brain upon trust to convert them into money, to pay debts, &c.

\**Present*.—HAGARTY, C. J. O., BURTON and PATTERSON, JJ. A.



"As to the balance remaining in the hands of the said trustee (if any), upon trust to pay the same to Robert Armstrong, a son of the said Edward Armstrong, or if the said party of the second part shall see fit, he may invest the same in the purchase of a homestead, and convey the said homestead to the said Robert Armstrong his heirs and assigns for ever."

Brain's evidence respecting the execution of the trust is thus noted:

"The deed put in marked 'A,' is a deed from the late Edward Armstrong to me. I sold the land therein mentioned to Ben. Tuck, and the chattels were sold at auction. Edward Armstrong is dead; he died in January last. After paying the legacies I will have in my hands about \$1000 to pay to R. Armstrong, less my charges. I have paid off Mrs. Jackson and Mrs. Robertson. I hold \$200 for the children of Robinson. Mr. Roper showed me a paper purporting to be an assignment. I have a balance of \$1,252 in my hands, minus my charges. I have paid all the claims I have heard of, or that have been presented to me. The amount received from the sale of the farm was \$5,000; from the chattels \$471.82, or thereabouts. I thought of buying Robert a homestead."

The power, under Rule 370 of the Judicature Act, is to attach debts owing or accruing from the garnishee to the judgment debtor.

It cannot be said that a debt was ever owing or accruing from the trustee. He was not bound to pay money at all, but was at liberty at his discretion to lay out the balance upon real estate. The balance was never ascertained, but if it had been there is no pretence that the trustee had decided to pay the money to the *cestui que* trust. Any inference to be drawn from his evidence would be to the contrary.

I do not doubt that the *cestui que* trust could have elected to take the money instead of allowing it to be converted into real estate by the purchase of a homestead: *Lewin* on Trusts, 6th ed., 570-788; *Jarman* on Wills, 3rd ed., 564, &c. But he had not so elected. Whatever remedy, therefore, the *cestui qui* trust had against the

trustee, it was not in the nature of an action to recover a debt owing to him; and in the absence of a decision by the trustee or an election to take as money by the *cestui que* trust no debt could be said to be accruing.

On this ground we must allow the appeal, with costs.

*Appeal allowed, with costs.*

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### WEINHOLD V. KLEIN.

*Lease of lands—Agreement as to allowance out of rent by reason of thistles being in the fields.*

The plaintiff rented to the defendant a field for the purpose of growing flax at an agreed rental of \$10 an acre. In answer to the claim for rent, the defendant attempted to shew that he had sustained damage by reason of the ground being full of thistles, and that it had been stipulated that an allowance was to be made in such case, for the loss to the defendant,

*Held* (affirming the judgment of the County Court), that evidence was properly admitted for the guidance of the jury, in adjusting such allowance, as to how the defendant had himself settled with other persons who had thistles in their fields rented by him.

THIS was an action in the County Court of the County of Perth, wherein Christopher Weinhold was plaintiff and John Klein was defendant.

The statement of claim was as follows :

|      |                          |          |
|------|--------------------------|----------|
| (1.) | Rent of 21 acres.....    | \$210 00 |
| (2.) | Drawing flax.....        | 9 00     |
| (3.) | Cord wood.....           | 12 00    |
|      |                          | <hr/>    |
|      |                          | \$231 00 |
|      | Credit.....              | \$113 50 |
|      |                          | <hr/>    |
|      | Claiming balance of..... | \$117 50 |

The statement of defence set forth that the defendant leased from plaintiff  $20\frac{3}{4}$  acres of land for the purpose of growing flax; and the bargain was that should the flax crop be injured by thistles the loss to the defendant occasioned thereby should be deducted from the rental. The defendant alleged that the land was so full of thistles that he sustained a loss of \$6 per acre.

The case was tried at the County Court sittings on the 26th and 27th days of June, 1883, before Judge Lizars with a jury, when a verdict of \$116 was entered for the plaintiff.

In the following term the defendant applied for and obtained a rule *nisi* for a new trial, which was then argued, and on the 28th July, 1883, was discharged by the learned Judge, who made the following minute of his ruling :

“The bargain was proved by plaintiff, and his evidence was corroborated by Valentine Weinhold. The jury seemed to have believed this as they have found the whole amount claimed by the plaintiff, \$116. It seems to me to be clear beyond a doubt that the admission of the evidence complained of could have had no effect upon the finding of the jury or their verdict.”

The defendant thereupon appealed to this Court, and the appeal came on to be argued on the 27th of May, 1884.\*

*J. P. Woods*, for the appellant.

*Osler*, Q. C., for the respondent.

The grounds of appeal, as also the evidence, are sufficiently stated in the judgment of this Court, delivered by

PATTERSON, J. A., May 28, 1884.—We see no sufficient reason to disturb the judgment appealed from. The plaintiff has a verdict for \$116, being a balance found by the jury for the rental of a field let at \$10 an acre for growing flax, and some small charges for services, less a payment of \$113. The complaint of the defendant is that the full price of \$10 an acre has been allowed without deducting anything for his loss by reason of the ground being full of thistles.

The plaintiff swears that the agreement was that the defendant should pay the \$10 absolutely, while defendant's version of the bargain is, that the plaintiff agreed to make good any damage to the flax crop from thistles.

\**Present*.—HAGARTY, C. J. O., BURTON and PATTERSON, JJ. A.

The technical grounds of complaint are the admission of evidence, by cross-examination of the witnesses in rebuttal, of the dealings of the defendant with other persons from whom he rented flax lands, in which there were thistles, and by permitting comparisons by witnesses between the plaintiff's field and the fields of others; and an alleged misdirection in telling the jury that they might take as a basis the amount taken by defendant off the price agreed to be paid to the parties on account of thistles.

It is impossible for us to say that the minds of the jury may not have been somewhat diverted from the direct questions in issue, as the defendant contends it was the tendency of the evidence complained of so to divert them, but I cannot say that any such evil effect is apparent. The evidence does not, on consideration, strike me as open to the objections urged against it.

On the main issue of fact on which the parties point blank opposed each other, it seems to me legitimate for the plaintiff to shew that the bargain which he says was made with him was precisely like that which the defendant made with the other persons similarly situated; and that seems to have been the effect, or one effect, of the most of the evidence now complained of. But if not receivable on that ground, there was always the defendant's contention to meet that an allowance was to be made for the thistles. The bargain, as put by the defendant and his witnesses in this particular, was indefinite. The proper allowance was to be made by the jury, and it is not easy to see how the defendant could object to the jury being told, for their guidance in adjusting the allowance, how the defendant had himself settled with other people who had thistles in their flax fields.

If given for this latter purpose the evidence was properly in rebuttal of the defendant's evidence touching the question of the allowance he claimed. But even if not strictly evidence in rebuttal, as, in any view, was true of part of the evidence of Valentine Weinhold, it would not follow that its admission at that stage of the trial vitiated the

trial so as to make a new trial a necessity. Relief on such a ground as that could only be expected where there was strong reason to apprehend that injustice had resulted from the irregularity. In this case the learned Judge, as appears by his memorandum, understood the verdict to express the belief of the jury of the plaintiff's version of the bargain.

The charge of misdirection seems to me to be disposed of by considering, what I have just alluded to, that no basis was provided by the terms of the bargain as put by the defendant, for computing the allowance for damage by thistles.

If I am right in thinking it proper to inform the jury on what basis the defendant settled with others, as indicating his own idea of the damage from such a cause, or of a scale of compensation which had satisfied him in other cases, it cannot have been misdirection to tell the jury that they might use the evidence for that purpose; and it is impossible to say that the observation, which we know only from the note of the objection, amounted to more than that.

Whatever view we might have been inclined to take of the matter on a motion for a new trial, it would be going too far on this appeal to say that the disposition of the case by the learned Judge below was wrong.

*Appeal dismissed, with costs.*

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## GARNER V. HAYES.

*Contract.*

One M., by a written contract, agreed with the defendant for the erection of a dwelling house in two months from date, and if M. neglected to build the house defendant was to be at liberty to purchase material and employ workmen to finish it, and deduct the cost of material, &c., out of the price. The plaintiff agreed to supply M. with lumber to be used in the building, and M., after a portion of the lumber had been placed in the building, gave plaintiff an order on defendant for the sum of \$341.46, expressed to be "for lumber used in your house, one month after the building is finished," which the defendant accepted. M. failed to complete the building, and the defendant employed a third party to do so in accordance with the terms of the agreement.

*Held*, per HAGARTY, C. J. O., and MORRISON, J. A., (affirming the judgment of the County Court), that the defendant was liable to pay the plaintiff, notwithstanding M. did not complete the building.

*Per* BURTON, J. A.—The defendant was entitled to deduct whatever was properly expended in completing the building under the contract, and the balance only remaining in his hands would be applicable to the payment of the order, but this balance according to the evidence was sufficient.

THIS was an appeal by the defendant from a judgment of William Elliott, Esquire, one of the Judges of the County Court of the county of Middlesex, rendered on the 2nd of January, 1883, ordering the defendant to pay to plaintiff \$267, and costs.

It appeared that by articles of agreement dated 4th October, 1880, one Thomas Milton agreed with the defendant Thomas Hayes to erect for Hayes a dwelling house in two months from the date of such contract, which provided:—

"The same to be done within the time aforesaid, in a good workman-like and substantial manner, to the satisfaction of the said Thomas Hayes, or some architect who may be appointed by the parties to these presents.

"If Milton shall, in any manner, neglect, or be guilty of any delay whatever, in building and finishing the said house, and if the said Thomas Hayes, or such architect as aforesaid, shall certify the same by writing, under his hand, and if Hayes shall give Milton notice in writing of such delay, and if Milton shall not proceed to complete the said building within one week after such notice, then it shall be lawful for Hayes to purchase material, and employ workmen to finish and complete the said dwelling-house, and deduct the costs of materials and money paid to workmen out of the moneys which shall be due to Milton under this

agreement. Contract price, \$1,025.75 as the work shall proceed to be ascertained by the parties or such architect. The remainder of the contract price within one month next after the house shall be completely built."

The defendant in his evidence admitted that Milton had commenced work upon the building, and that the plaintiff had supplied lumber for part thereof, and had received an order given by Milton on defendant for the amount coming to plaintiff, which order was in the terms following :—

LONDON EAST, October 21st, 1880.

THOMAS HAYES, ESQ.,—Please pay to W. C. Garner three hundred and forty-one dollars and forty-six cents, for lumber used in your house, one month after the building is finished, and oblige,

"THOMAS HAYES."

THOMAS MILTON.

Which Hayes signed as indicated, and which he swore he so signed because Milton wanted him to sign an order for him, and that he had been induced to do so on the promise that Milton would go on and finish the building without stopping; but he alleged that Milton, after the order was so given and signed, did not do much further work on the building, and that he (defendant) had to get others to finish it, Milton having refused to go on unless defendant paid him more money, although defendant notified him on the 3rd of March, 1881, to go on and finish the house; in consequence of which defendant re-let the contract. At this time defendant had paid Milton \$425 on account of the contract. The learned Judge found that the expression in the order, lumber used, meant lumber already supplied as well as yet to be supplied, and that \$267 was the value of the lumber actually used in the house, and he gave judgment for the plaintiff for that sum.

The appeal came on to be heard before this Court on the 26th of May, 1884.\*

*MacBeth*, for the appellant, contended that the words "one month after the building is finished," in the order, meant "one month after Milton finished the building."

\**Present*.—HAGARTY, C.J.O., BURTON and MORRISON, JJ.A.



The circumstances of the case, and the evidence shew that the plaintiff was not to call for his money on such order, unless and until the defendant's house should be finished by Milton; and that the order could operate only as an assignment of moneys due, or to become due to Milton, on his contract; and the plaintiff, in order to recover the amount awarded to him by the learned Judge of the Court below, must shew that at, or after the presentation of the order to the defendant, the latter had in his hands moneys to that amount, which, but for such order, would be due and payable to Milton on his contract.

*R. M. Meredith*, for the respondent. The order or direction to pay the money here given was not a conditional one in any sense whatever, but was an absolute direction to pay the amount mentioned in it. The only objection that can be raised against its negotiability is that the time of payment may be said to be uncertain. The words, "for lumber used in your house," merely express the nature of the consideration which Milton had received, and if the writing were conditional upon the building being completed, and if the time were uncertain, they became absolute and certain by the completion of the building. 2. Whether the writing be a bill of exchange or not is immaterial, as it is the payee who is seeking to enforce it. It has not been transferred. 3. The appellant's contention that the words, "after the building is finished," ought to read "after Milton finishes the building," cannot prevail, because even if such were the expressed intention of the parties parol evidence could not be received to establish it, and besides it was not the intention of the parties, either expressed or implied. The intention was to make Hayes responsible for the value of the lumber used and to be used in the building.

In addition to the cases mentioned in the judgment: *Chesney v. St. John*, 4 A. R. 150; *McLeod v. Snee*, 2 Str. 762; *Field v. McGaw*, L. R. 4 C. P. 660; *Wilson v. Coup-land*, 5 B. & Ald. 228; *Mason v. Scott*, 22 Gr. 592 were referred to.

June 9, 1884. HAGARTY, C. J. O.—I think the plaintiff's claim, which appears to be fair and just, at least to the extent awarded by the learned Judge, may be supported on the principles so fully explained in such cases as *Brice v. Bannister*, 3 Q. B. D. 569, and in *Mitchell v. Goodall*, in this Court (5 A. R. 164.)

The plaintiff was supplying Milton with lumber to be used in defendant's building. He had delivered most of it and was pressing Milton for payment, and he wished defendant to become bound to him before he delivered any more. First verbally, and afterwards by signing the memorandum in writing, defendant agreed to this. [His Lordship here read the memorandum or order above set out.]

There was contradictory evidence as to the amount of work done, including this lumber, at the time of the acceptance, by Milton on his contract with the defendant.

A large amount (perhaps, though not certainly) somewhat less than the aggregate of the previous payments, \$425, and this lumber order, was at that time received in value by defendant. He urges that by the terms of the memorandum it was not payable until a month after Milton finished the building under his contract.

I agree with the learned Judge that such a construction of the writing is not absolutely required. Milton, as he says, might die, or other contingencies might happen. Plaintiff would hardly have accepted the arrangement on any such idea, and defendant admitted to others that he looked upon himself as liable for this acceptance in any event. The fair construction seems to me to be that defendant accepted the order as an assent and an agreement on his part that money to the extent of the order due or to accrue due from him to Milton should be appropriated to it: that he was to become plaintiff's debtor for the lumber in lieu of Milton, and that the latter's final claim on him on the contract was to be so much reduced; in fact that he thus was to pay, and in substance did pay Milton for the lumber required for his building under the contract. He had certain rights thereunder against Milton in case of the

latter being guilty of delay in the completion, and the right on his default to finish the building, charging the defaulter the cost thereof.

The possible solvency or insolvency of Milton cannot affect the decision.

I do not think plaintiff's claim to be necessarily confined to the twenty-five per cent. to be retained by defendant as the fund from which he should be paid. I think the claim comes within the principles laid down in *Brice v. Bannister*.

The facts are very distinguishable from *Tooth v. Hallett*, L. R. 4 Ch. 242. The head note to that case is: "A builder assigned to T. £200 of what should be coming to him under a building contract with A. The contract provided that the building should be finished by a certain day, and if not, that A. might employ another builder to complete it. When the assignment was made the time for completion had expired. Soon afterwards the builder executed a creditors' deed. The trustee of the deed completed the building with his own money, and was repaid by A. Allowing this repayment as proper, nothing remained due on the contract. T. filed his bill to enforce payment of the £200. Held, that the payments by A. to the trustee were proper, and that the bill ought to be dismissed, with costs." This was in 1869, in Appeal. A written order had been given but never accepted in writing, and when presented defendants told plaintiff how matters stood, and that if they had to employ another builder there would probably be nothing coming to the giver of the order.

In the case before us I think there was a complete appropriation of the price of the lumber for plaintiff's benefit, and as payment *pro tanto* of Milton's claim on defendant.

I think the appeal should be dismissed, with costs.

BURTON, J. A.—The plaintiff's action, if sustainable at all, can only be so sustained upon the principle that the order of the 21st October, 1880, was in effect an equitable assignment of moneys then due or thereafter to become

due under Milton's contract with the defendant, and he can only recover to the extent of moneys shewn to be in the defendant's hands under that contract, which moneys would be only payable to the plaintiff after the expiration of one month from the completion of the building, although it would be immaterial whether the building was completed by Milton or a third person employed by the defendant under the power reserved to him to employ such person in the event of default.

The point upon which I have felt most difficulty is in coming to a conclusion upon the evidence that there was money in the defendant's hands payable to Milton to the extent found by the verdict.

In the view which the learned Judge took of the case in the Court, below this inquiry became immaterial, and we have therefore to examine the evidence upon this point for ourselves without the assistance of any finding upon it by the Judge below.

The case of *Brice v. Bannister*, reported in L. R. 3 Q. B. D. 569, would have been precisely in point if Milton had gone on and completed the building—his failure to do so has caused the difficulty. That case, it seems to me, was a peculiarly hard one inasmuch as the defendant there not only did nothing to recognize the order given by the contractor to the plaintiff, but on the contrary refused to have anything to do with it or be bound by it, but he subsequently paid moneys to the contractor exceeding the amount of that order, which it was necessary for him to do to induce the contractor to proceed with the work. It was contended there by the defendant that he should not be held liable, as at the time the order was given there was nothing due to the contractor: that there was no binding acceptance of the order by the defendant, and that had not the defendant made advances to the contractor, he never would have been in a position to become a creditor of the defendant.

That case, as I have said, would be clearly in point if Milton, the contractor here, had gone on to complete the

contract, and had been paid for such completion, inasmuch as the moneys to become due under the contract were to the extent of the order, or at least to the extent of the value of the lumber furnished, not exceeding the amount of the order, assigned, and any payment made by the defendant to Milton subsequently to the prejudice of the plaintiff, would be paid in his own wrong.

But Milton made default in his contract, and under its provisions the defendant became entitled to purchase materials, and employ workmen to finish and complete the building, and deduct the cost of such materials, &c., out of the moneys due to Milton under his contract.

Speaking for myself my opinion is, that the defendant was entitled to deduct whatever was properly expended in in the terms of this provision in the completion of the building from the amount coming to Milton, and that the balance, if any remaining in his hands, would be all to which the plaintiff would be entitled under the order or equitable assignment.

Now, I am free to say that the state of the accounts has not been made as clear as it might have been, but I think there is evidence to warrant a finding in favour of the plaintiff, to the amount found by the Court below.

|  |                |
|--|----------------|
| The contract price was.....  | \$1025 00      |
| All that was paid to Milton apart<br>from the order was.....   | \$425 00       |
| There is a conflict of evidence as to<br>the sum expended in finishing the<br>building, but assuming the evi-<br>dence of the defendant to be cor-<br>rect, it was ..... | 300 00         |
|  | <hr/> \$725 00 |

Leaving a balance of..... \$300 00

a sum more than enough to meet the amount found to be due to the plaintiff.

There is, however, a conflict of evidence on this point, but the inference I draw from it is that the defendant always fancied himself liable for the amount of the order:



that the work done to complete the house included some extras not included in the contract, and that the evidence of Milton as to the work and material expended at the time it was given is, on the whole, to be preferred to that given on behalf of the defendant.

Under any circumstances the plaintiff would be entitled to a verdict for something, and I think in the view we take of the case there is evidence to justify its being retained for the amount at which the learned Judge has entered it.

I agree, therefore, with the learned Chief Justice in holding that the appeal should be dismissed, with costs,

MORRISON, J.A., agreed with the other members of the Court that the appeal should be dismissed, with costs.

*Appeal dismissed, with costs.*

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## SIMPSON ET AL. V. CORBETT.

*Illegitimate children—Escheat—Mortgage.*

The testator, by his will, gave all his real and personal estate to his two illegitimate children, D. and E., with the right of survivorship, and appointed the defendant C., who was his medical attendant, executor and also guardian of the children. The real estate, valued at \$1,600, was subject to a mortgage in favor of one W. for \$200. The children died in infancy, D. having been the survivor, and shortly after his death the defendant wrote to the next of kin of the testator informing him of the decease of D., and expressing a desire to transfer to him all the testator's estate. During D.'s lifetime the defendant had paid his interest on the mortgage, either from his own funds or moneys of the estate, and had agreed with W. for the purchase of the mortgage, and within two months after writing the letter referred to paid to W. the amount of principal and interest remaining due on the mortgage, and obtained from him a transfer thereof. The plaintiffs, being advised that the estate of D. had escheated to the Crown, subsequently obtained from the Lieutenant-Governor a grant of all interest of the Government in such estate, and procured letters of administration from the proper Court to be issued to them, whereupon they instituted proceedings against C. for an account of his dealings with both estates, who set up a right to hold all the interest of D., who died intestate and who, as well as the testator, died without owing any debts other than one due the defendant himself by the testator. Judgment was pronounced by FERGUSON, J., declaring (by the second clause thereof) that the mortgage and the lands comprised therein formed part of the estate of the testator; directing the usual administration accounts, payment of debts and an assignment of the estate to the plaintiffs, which on appeal to this Court was affirmed:

BURTON, J. A., dissenting, who thought such second clause should be struck out, without prejudice to the right of the plaintiffs to give such further evidence in the Master's office as they should be advised, but that with this variation such judgment should be affirmed.

## APPEAL from Ferguson, J.

The proceedings had been commenced by bill filed on 19th of March, 1881, claiming an account of the dealings of the defendant, Robert Astley Corbett, with the estates of Charles Monroe, deceased, and of Duncan Monroe, also deceased, under the circumstances appearing in the judgment on the original hearing, as also on this appeal.

The cause came on for hearing and examination of witnesses before Ferguson, J., at Toronto, on the 12th of December, 1881.

After taking time to look into cases his Lordship, on the 15th January, 1883, gave judgment in favour of the plaintiffs, declaring:

“(2.) That the mortgage and the lands comprised therein in the pleadings mentioned, form part of the personal estate of the testator Charles Monroe in the pleadings mentioned, and that subject to the claims (if any) of that estate the defendant is trustee thereof, and of all other the personal estate of the said Charles Monroe and Duncan Monroe, and of the gains, profits, and advantages that have accrued to him from the personal estate of the said Duncan Monroe, during the life time of the said Duncan Monroe, by virtue of his executorship and guardianship as in the bill of complaint mentioned for the estate of the said Charles Monroe, and for the estate of the infant Duncan Monroe, deceased, respectively in the pleadings mentioned, and for the plaintiffs as the administrators of the estate of the said Duncan Monroe, and doth order and adjudge the same accordingly.” (3.) And further, ordered that the usual administration account should be taken by the Master. (4.) and “that the said Master do also take an account of what (if anything) is due from the defendant to the plaintiffs in respect of the dealings of the said defendant as guardian with the estate and effects, real and personal of the said infant ; of all gains, profits, and advantages which have accrued to the defendant by virtue of his executorship and guardianship aforesaid. (5.) And in case there shall be no debts remaining due and unpaid by the estate of the said Charles Monroe, and if, upon the taking of the said account, a balance shall be found due to the said defendant, then, upon payment of the said balance, or in case nothing shall be found due to the said defendant, then forthwith after the confirmation of the Master’s report, this Court doth order and adjudge that the defendant do assign, convey, and transfer to the plaintiffs the said mortgage and the lands therein comprised. \* \* \* and deliver up possession to the plaintiffs of the lands comprised therein.” See 5 O. R. 377, where and in the present judgments the facts clearly appear.

The defendant thereupon appealed, and the appeal came on to be argued on the 9th of June, 1884.\*

*Bethune, Q. C.*, for the appellant. No title to the real estate of Charles Monroe or of Duncan Monroe the infant, ever vested in the Government of this province, neither did any such title vest in the plaintiffs under the grant from the Crown, as the interest of Duncan. The equity of redemption, never escheated to the Crown and the defendant by his purchase from Williams the mortgagee of the

\* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

equity of redemption, on the death of the infant Duncan Monroe acquired the estate absolutely freed and discharged therefrom.

There were no creditors of Duncan, neither was there any creditor of the testator other than the defendant, and the personal estate was insufficient to pay it; there was not anything therefore upon which the grant of letters of administration in favour of the plaintiffs could operate; and the trust on the part of the defendant, if in law he were trustee, had completely ceased before he had arranged with Williams for the purchase of the lands.

The defendant also set up the Statute of Limitations as a bar to any relief.

*MacLennan*, Q. C., for the respondents. Under the letters of administration issued to the plaintiffs they are the duly appointed personal representatives of the deceased infant, Duncan Munroe; and the defendant cannot question their title or impugn their right to call upon him for an account of his dealings with the estate of the testator. Here the evidence distinctly proves that after the death of Charles Monroe, the defendant paid interest on the mortgage out of the assets which under the will belonged to Duncan, and the defendant finally paid the amount due on the security, and obtained from the mortgagee an assignment of the instrument. It is true the defendant now alleges that he discharged such mortgage debt out of his own funds; but whether that were so or it was from moneys of the estate that he paid the amount, is wholly immaterial, as upon the assignment to him the mortgage became an asset of the estate; and the Court will not permit him now to say that he acquired the security in his private capacity and not as executor. In short the Court will not permit him to hold such security for his own benefit, thereby making a profit out of his executorship, and will hold him bound to account to these plaintiffs for the value of such mortgage as a chose in action, and as such part of the personal estate of Duncan.

*Sugden v. Crossland*, 3 S. & G. 192; *Burgess v. Wheate* 1 Eden 211; *Beale v. Symonds*, 16 Beav. 406; *Forster v. Patterson*, 17 Ch. D. 132; *Kinsman v. Rouse*, 17 Ch. D. 104; Wms. Exors., 8th Ed. pp., 1662, 1849; R. S. O. ch 108, ss. 19 and 30, were referred to.

June 30, 1884. HAGARTY, C. J. O.—The facts in this case are very peculiar.

Charles Monroe died in 1867, possessed of personalty and of a farm worth about \$1,600, subject to a mortgage in fee to Mr. Williams for \$200.

He had two illegitimate children, to whom he devised all his estate with benefit of survivorship. He appointed the defendant, who was his medical attendant, his executor and guardian of his children. One child died, aged 8, January, 1871, and the other, Duncan Monroe, died February 2nd, 1871, aged 11 years. Up to the last death defendant had managed everything connected with the estate.

Some time before Duncan's death he negotiated with Williams as to getting an assignment of the mortgage, and he got Williams to consent to reduce the rate of interest, telling him he would take it off his hands if he reduced the interest, and as he (the defendant) had funds of his own to spare, he would take an assignment of the mortgage. It seems clear that this was agreed to some time before Duncan's death.

Shortly after Duncan's death he wrote to one Charles Munroe, saying that he understood that he was the nearest relation, and "that he, the defendant, would like to be relieved of the management of the estate: that there was a mortgage of \$200 and accounts and notes to about \$150, in all \$350 or thereabouts, of incumbrance on said estate. The property is worth about \$1,600. I am prepared to hand over to yourself or your agent all books, papers, and documents belonging to said estate at any moment."

A few weeks after writing this letter, on 17th April, 1871, he obtained an assignment of the mortgage from Mr. Williams. The assignment recites the mortgage from C.



Monroe, and that there was \$200 due for principal and \$6.80 for interest, and in consideration of that sum Williams assigned to defendant the lands and moneys, subject nevertheless to such equity of redemption: and he appoints the defendant his attorney to receive and take the moneys from said mortgagor, his executors, administrators and assigns, or any other person liable to pay the same; with usual covenants as between mortgagee and assignee.

The defendant swears that he paid this out of his own moneys, and not with moneys of the estate, as he was considerably in advance to it. After taking this assignment he appears to have been determined to hold the estate as his own.

From the death of the mortgagor Monroe, defendant has had the farm leased to annual tenants.

Ch. 94 Rev. Ont. declares that when any lands, &c., have escheated to the Crown the Lieutenant-Governor in Council may waive or release any right of the Crown therein so as thereby to vest the property, absolutely or otherwise, in the persons who would have been entitled thereto but for the forfeiture, and (sec. 6) the Lieutenant-Governor may make any assignment of personal property to which the Crown is entitled by reason of the persons last entitled having died intestate without leaving any kin or other persons entitled to succeed thereto, or by reason of the same having become forfeit to the Crown, &c., or may make assignment of any portions of such personal property for the purpose of transferring or restoring the same to any person or persons having a legal or moral claim on the person to whom the same had belonged, or for carrying into effect any dispositions which such person may have contemplated, &c.

By grant, dated 24th July, 1880, the Queen granted to the plaintiffs all her interest in the real estate of the said Duncan Munroe, and assigned all her interest in his personal estate upon certain trusts, among which there was a trust to enter into and take possession of the lands of said Duncan Munroe, and to call in and possess themselves of all his personal estate and effects.

On the 20th October, 1880, letters of administration were granted by the Surrogate Court to the plaintiff of all the personal estate of Duncan Munroe, reciting the escheat and the grant by the Crown.

The plaintiffs by their bill charge that the defendant paid for this mortgage out of the moneys of the estate of Duncan, and that he took the assignment as trustee for Duncan's estate: that they have applied to him for an account which he has refused. They also charge him as a trustee for them as administrators of Duncan's personalty, and they pray for an account and other relief. He answers declaring that he fully and duly administered all the estate, and that a considerable sum was due to him from the estate: that he is not indebted to it, and bought the Williams mortgage with his own money: that Williams's estate as mortgagee was irredeemable, subject only to payment of any creditors of Charles or Duncan Munroe: and that there are no such creditors, except his own claim on the estate, "which he has never thought fit actively to assert."

At the instance of the Attorney-General the defendant (as is said under protest) has given in a full account of all his dealings with the estate down to the burial, &c., of Duncan Munro, and also a continued account thereof, and of the rents and profits and expenditures of and in respect of the land up to the month when Duncan died. He brings the estate in debt to him \$188.

In this account there are many items up to Duncan's death of defendant's own charges for medical attendance and his expenses in keeping books and doing the business of the estate, in all about \$276.

The defendant was the only witness examined. I gather from his evidence that the plaintiffs offered to pay him the money he had paid to Williams, and that he refused to accept it "because there were several debts due me by the estate, and I had not received anything for the trouble I had for five years."

A decree was made in plaintiffs' favour to the effect



following: [His Lordship here read the substance of the decree as above set out]. The defendant appeals.

We cannot go behind the letters of administration on any of the grounds suggested by Mr. Bethune. So long as the objection fails to touch the jurisdiction of the Court to grant them we cannot give effect to it. See *Williams, Executors*, vol. 2, p. 536, 6th ed.

The case of *Wilmott v. Jenkins*, 1 Beav. 400 cannot affect our decision.

I think the plaintiffs are entitled to the account prayed for. It seems a case on its facts eminently calling for a full inquiry into the dealings with the estate by the defendant.

The law as to escheat in the case of an equity of redemption is laid down in *Coote on Mortgages* 42.; 2 *Fisher on Mortgages*, 762.

As such it does not escheat to the Crown, on the old principle of there being still a tenant of the freehold, but it is conceded that in the case of creditors their claims can be enforced to the extent of its value over the charge.

The legal question is much discussed by Sir J. Wigram, V. C., in *Doune v. Morris*, 3 Hare 394.

In *Beale v. Symonds*, 16 Beav. 406, it is said the mortgagee can refuse to be redeemed (except in case of debts) and insist on holding absolutely.

If, the day before Duncan's death, defendant had taken the assignment, whether paying his own money or that of the estate, he would not have been allowed to make any profit out of the dealing.

Here he had been in negotiation with Williams for this assignment long before Duncan's death, and, as we must hold, acting in good faith for the estate of the children for whom he was guardian, had arranged to have it assigned to himself as soon as he was in funds to pay the debt; and had the interest reduced for the benefit of the estate.

In a couple of months after Duncan's death he takes the assignment in pursuance of his previous arrangement made as guardian and trustee.

Between the death and the assignment he writes the letter still in the character of guardian or executor. And when the assignment is executed shortly after, it is made expressly subject to the equity of redemption in the mortgagor and those claiming under him.

It is not clear whether at the moment of taking the assignment from Williams he had formed the idea of taking the property for himself. He says (p. 13): "Q.—When did you first think of getting this property for yourself? A.—When I took an assignment of the mortgage. When I bought the mortgage and paid for it I thought I had as good a right to that when there were no heirs. I was informed then that there was no heir to the estate."

All this is consistent with holding that he really took the assignment in good faith as guardian and afterwards formed the plan of keeping it.

Granting that Williams could (except as against creditors) insist on holding free of redemption, must the defendant, on the facts before us, be necessarily put in the same position?

It seems to me, if his argument be sound, that he could equally maintain that position, even if it appeared that he took and paid for the assignment out of funds belonging to the estate. He would say, "I can be made to account for all the moneys received, but as to this farm, Williams could have held it absolutely and I have all his rights. The equity never escheated, the crown had nothing in it to grant to plaintiffs."

The strength of the defendant's argument was, and must be, that when he took the assignment he was no longer in any fiduciary position to any one: that he was free to act as he pleased for his own benefit.

I doubt the soundness of this in a case like the present. Whenever there appeared a legal representative of Duncan's estate I think he was entitled to a full reckoning as to all the assets of such estate, and that in the final reckoning and adjustment of the estate defendant should not

occupy any higher or better position than any other trustee who has dealt with the assets. If it appear that he has paid money of his own to redeem property of the estate, he will be allowed the amount and interest in account.

I hold, in effect, that he acquired the legal estate in this mortgage under an arrangement made as, and while he was, guardian and trustee, with the mortgagee, and that when he took the assignment he took it under the previous arrangement, and that when ultimately the legal representative and assignee in trust of the realty appears, the defendant is not in a position to claim this land as his own, but must account for it as an asset of Duncan's estate now legally represented.

According to his own shewing he is a creditor of the estate, and there was this debt due by the estate, though, as he says in his evidence, he "has never thought fit actively to assert it." The learned Judge below, however, says he must assume there may be other creditors.

I think the decree must certainly be affirmed as to taking the accounts.

On the whole I am not prepared to hold that it is wrong in its directions as to these mortgaged premises, and I hope the law is strong enough to prevent the defendant succeeding in obtaining this land for himself.

BURTON, J. A.—I agree with the learned Chief Justice that it is not competent to the defendant to question the validity of the letters of administration in this proceeding, nor do I dispute the position that a person having once filled the position of trustee of any property, although the property may have passed into the hands of innocent purchasers freed from the trust, yet if it again comes even for value into the hands of the original party, the trust in his hands will revive. In that respect equity followed the law, for if a trespasser wrongfully in possession of goods sell them in market overt, the owner's title is barred, but if they come to the trespasser again, the owner may seize them: *Bovy v. Smith*, 2 Ch. Ca. 126.

But I have been unable to see the application of that rule to the case before us.

I do not question that the defendant is liable to account to the personal representatives of Duncan for the personal estate belonging to the deceased, and that they are entitled, as Duncan would have been, if living, to an account of his dealings and transactions as executor of the late Charles Munroe; but that is a very different thing from saying that they are entitled as his representatives to redeem this mortgage.

Counsel for the appellants indeed conceded this, but they based the right on the ground that this defendant could not be heard to say that he acquired this mortgage in his individual capacity and not as executor, treating it as if he were debarred by his position as executor from making a profit out of his executorship.

Whilst admitting the rule I fail to see its application upon the facts in evidence in this case.

When Charles died in 1867, he had only an equity of redemption in the land in question, and although there remained a liability upon his covenant to Col. Williams, as between his estate and Duncan the latter was bound to indemnify the former.

The defendant, as executor, discharged all the testator's debts with the exception of this mortgage, and it was not his duty as executor to discharge it although it was his duty morally, if not legally, as guardian of the infant to look after his interests and prevent his losing the estate to the mortgagee. There were therefore at the time of Duncan's death no claims against the testator's estate with the exception of this mortgage, which should have been borne by the land on which it was charged, and Duncan being an infant left no debts, and the mortgage debt, though a charge upon the estate, was not of course a debt of his contracting or for which he was liable.

During the lifetime of Duncan the defendant received the rents, paid some arrears of interest on the mortgage, and some taxes.

It appears that when paying the interest on the first occasion, he objected to the rate made payable by the terms of the mortgage: that the mortgagee said he was unwilling to loan his money for any less: that if the defendant wanted the mortgage he might take it, but that he was unwilling to let his money remain out at less than ten per cent.; but he agreed, upon the defendant intimating his willingness to purchase it in a short time from moneys of his own, to reduce the rate of interest one per cent. until he was in a position to take it up.

I do not think his position as executor of Charles has any thing to do with the case, and that it may be put out of view.

But if he had purchased the mortgage during Duncan's life time, and taken an assignment of it, that would in no way have prejudiced Duncan, and there was nothing in their relative positions to prevent his making such an advance from his own moneys, and taking either an assignment of the existing mortgage or a new mortgage from Duncan.

If he had taken such new mortgage, and Duncan had died intestate, would not the estate have become absolute in him, subject only to the payment of Duncan's debts, if any?

If Williams had foreclosed, I am assuming of course that every thing had been fairly conducted, was there anything in the position which the defendant occupied which would have precluded him from purchasing the property?

When we speak of fiduciary relationships and the incapacity of people filling those positions to make any profit out of them, we must be careful to understand precisely what that relationship is, and what is meant by making a profit out of it. I think there is some confusion in speaking of this mortgage debt as a chose in action and part of the personal estate of Duncan. It was a debt on Duncan's land; if it had been paid from the assets of Duncan in his life time, the debt would have been discharged, and whether it was released or assigned to the defendant that



would have been the effect of the payment ; but before it was so paid, Duncan died intestate, and without lawful issue, and being illegitimate the estate became absolute in Williams, and the fiduciary relationship ceased, except of course as to accounting for past transactions.

I can see no reason, if the fact be so, why the defendant should not with his own moneys purchase the estate from Williams without being liable to account to the present plaintiffs. I know of no rule of law or equity which would render him liable so to account. It may possibly be a different question whether the contract with Williams could stand if the defendant, with the knowledge that Williams's estate had become absolute, concealed that fact from him, and purchased on a representation that he was acquiring only a mortgagee's interest, when he was acquiring the farm absolutely in fee simple.

Col. Williams certainly should have been informed of the actual facts, so that he might have exercised his option of allowing the relatives of the deceased Duncan to redeem, or of taking advantage, if so disposed, of the benefit which by operation of law had accrued to him. But with that we have nothing to do.

I am not overlooking the fact that, if the mortgagee had endeavored to enforce the personal covenant against the representative of the mortgagor, he could not, under the circumstances, in all probability resist a decree for a reconveyance to the personal representative ; but I do not see how that aids the plaintiffs here. I might say, in the words of the Lord Keeper in *Burgess v. Wheate*, 1 Eden 255 : " Perhaps it would not be difficult to answer what would be the justice of that case, but it is not to the business in hand."

It is true that the mortgagee here was not aware of his rights, and supposed when he assigned his interest in the land he was merely assigning the mortgage ; it is at the same time clear that the defendant was aware of his position, and took that assignment with the knowledge that no one had the right to redeem, and it may be as between them



that such a transaction would not be allowed to stand ; but however the defendant may have intended to act originally, the evidence is all one way, that at this time he had formed the deliberate intention of acquiring that property for his own purposes and with his own money, and that at that time he could not be said to hold any fiduciary position ; the estate was the absolute estate of Col. Williams, not even the Crown had the right to redeem, and although the estate thus acquired would have been liable to the creditors of Duncan, none such existed. To hold that under such circumstances he was intending to redeem the mortgage would, in my judgment, be not only to find without evidence, but in the teeth of evidence. I regard his remarks when offered the money by Simpson as some sort of excuse for what might be regarded as rather a shabby proceeding ; but they do not contradict his positive statement that he purchased with his own money for himself ; and although my strong desire and inclination is, to find in favour of the plaintiffs, I feel constrained by strict rules of law to hold that they have not shewn any right to redeem the defendant.

I attach no importance to the letter written by the defendant in February, 1871 to one of the members of the father's family in Scotland. That letter was written with a desire to get rid of the trust. When he became aware of the state of the law he was at liberty, if so disposed, to change his mind. That is a question of ethics, not of law, and therefore I do not feel that it is any part of my duty to express any opinion upon it, and I do not think that the accounts rendered to the Government can be called in aid of the plaintiffs, as they were simply rendered for the purpose of shewing how the account would stand if he were legally bound to account, but with an express reservation of his legal rights.

I think therefore that the declaration contained in the second paragraph of the decree is premature and should be struck out of it without predjudice to the right of the plaintiffs to give such further evidence in the Master's

office as they may be advised ; and with that variation the decree should be affirmed.

PATTERSON, J. A.—The decree in this case, in declaring that the mortgaged lands form part of the personal estate of Charles Monroe, is plainly in accordance with justice. That consideration, while it affords a strong motive for the exercise of all reasonable astuteness for the purpose of upholding the decree, doubtless creates the necessity for caution against being led by a hard case to lay down bad law. I have given anxious attention to different aspects which the questions assume, and I have come to the conclusion that the decree ought to be sustained. I shall attempt to explain my reasons, which I think do not differ much from those given by the learned Judge in the Court below.

The fact, which seems to me the important one, and which I think ought to be deduced as the fair result of the evidence is, that the transaction between the defendant and Mr. Williams, the mortgagee, was in essence the redemption of the mortgage.

Charles Monroe died in October, 1867. He had, on the 14th February, 1865, made the mortgage to secure \$200 payable in two years, with interest at ten per cent., payable annually. The mortgage was thus overdue when Charles died, and the interest was in arrear. The defendant, acting as executor of Charles, paid on 2nd November, 1867, as the date appears from his account, \$55 in full for the interest at ten per cent. from the date of the mortgage to 14th November, 1867. This payment, the defendant states, was made with money advanced by him, as there was not enough money of the estate in his hands. On that occasion the defendant complained of the rate of interest. Mr. Williams said he was not willing to lend his money for less, but that if defendant would take the mortgage off his hands he would reduce the rate. The defendant said he would take an assignment of the mortgage as he had funds of his own to spare, or as soon as he had funds to spare.

From that time forward the interest was paid by the defendant to Mr. Williams at eight per cent. instead of ten. The defendant explains that he kept the interest paid up by advancing money when he had not funds of the estate.

Up to this stage, that is to say, during all the life time of Duncan Monroe, the defendant's ward and the person entitled to the equity of redemption under the will of Charles Monroe, I see no ground for a conjecture that the defendant was not honestly acting in furtherance of the interest of Duncan. Had the transaction been completed in Duncan's life time it would have been quite proper for the defendant, who advanced the money, to take for his security an assignment of the mortgage. He would have become a creditor of Duncan, if he was regarded as advancing the money for his use, and he would also have become a creditor of the estate of Charles, as assignee of Charles's covenant to pay the mortgage money.

If the transaction had been completed in Duncan's life time, so that at his death the defendant had been seized of the legal estate, the defendant might have asserted for himself the rights which he now contends accrued to Mr. Williams; and possibly it might have become necessary to consider whether the old feudal doctrines, on which the law of escheat is said to rest, can be applied with all their rigidity now that the lines which separate legal and equitable estates are fainter than of yore. It might be found that when, more than a century ago, Lord Mansfield, discussing this very subject, remarked that "the forum where it is adjudged is the only difference between trusts and legal estates:" *Burgess v. Wheate*, 1 Wm. Bl. 123, 160, that he stated a truth which in our days, when the different *fora* have been merged into one; should be decisive of the right of the crown, whether under the name of lord by escheat or *ultimus hæres*, to succeed to an equity of redemption as well as to any other valuable asset, whether of the nature of real or personal estate.

At present I do not think those questions arise.

Assuming for the present that the law has not been

modified by the Judicature Act, the defendant has, in *Beale v. Symonds*, 16 Beav. 406, a pretty direct authority for his contention that at the death of Duncan the estate became absolute in the mortgagee. The only difference which I perceive between that case and this is, that here the actual possession was in the mortgagor; but that may be unimportant. The question is, are we bound to hold that the defendant, who had no title to the land in Duncan's lifetime, has since Duncan's death acquired it so as to be entitled to hold it for his own individual benefit?

Duncan died on the 2nd February, 1871. On the 17th of the following April the defendant paid Mr. Williams the mortgage money, with interest at eight per cent. from the next preceding payment of interest, and took an assignment of the mortgage in the ordinary form, assigning the debt, conveying the land subject to the equity of redemption, empowering the assignee to sue for the debt in the name of the assignor, &c.

The defendant said in his evidence that at the time of his taking the assignment of the mortgage he was informed that there were no heirs to the estate. He had always known that the children were illegitimate, but was not before aware of the legal consequence of that.

By this he means it to be understood that he knew that Mr. Williams was absolute owner of the estate, which was worth many times the amount of the mortgage money; and yet he did not buy the land and take a deed of the land, but paid the mortgage money and took an assignment of the debt with the land as security for it. In fact he not only did this, as is apparent from the documents themselves, but when he speaks of it in the passage of his evidence to which I have just alluded, he speaks of having bought *the mortgage*, not the land. There is no pretence that Mr. Williams knew or was given to understand by the defendant that he was anything but mortgagee, or that the defendant was dealing with him in any other character.

Under these circumstances, in connection with which I take the defendant's letter to the relative in Scotland,



within three weeks after the death of Duncan, in which he describes the mortgage as an incumbrance merely, it seems to me that the unavoidable inference of fact is, that the defendant, when he paid the money and took the assignment, was doing and professing to do nothing more than what four years before Mr. Williams had agreed that he might do.

He was in effect redeeming Mr. Williams, who consented to be redeemed; and if he paid his own moneys which I would not take as of course to be the fact, he was secured by the assignment, and became a creditor of the estate just as he would have done if he had carried out the transaction in 1867.

Now, is there any rule of law that interferes with this view of the matter?

Turning to *Burgess v. Wheate*, as to a mine of legal principles touching the law of escheat, we find the present position discussed by the Master of the Rolls, and also by Lord Mansfield. The former says (1 Wm. Bl. 149): "Then it was said, suppose mortgagor die without heir, shall the mortgagee hold the estate absolutely. And if he demands his money too against the personal representative, shall he have both land and money? If the mortgagor dies without heir or creditor, I see no inconvenience if the mortgagee held it absolutely. In the case of a forfeiture for treason it is certain the Crown might redeem, as in *Sir Salathiel Lovel's Case*, Salk. 85. And as to the supposition that the mortgagee may demand his money too, that must be where the mortgagor dies without heir; therefore the demand must be against the personal representatives by virtue of some bond or covenant for payment of the money. And if the mortgagee took his remedy against the personal representative, I think the Court would compel the mortgagee to re-convey; not to the lord by escheat, but to the personal representative; and if necessary would consider the estate re-conveyed as coming in lieu of the personalty and as assets to answer even simple contract creditors. Under these circumstances, where is the great inconvenience?"

Lord Mansfield, (pp. 169-70,) uses language somewhat similar; and Lord Keeper Henley, (whose remarks are at p. 184 of 1 Wm. Bl., but more fully given in 1 Eden at p. 255,) deals with the case of mortgagor dying without heirs, but does not touch the hypothesis of mortgagee choosing to demand his money.

In *Reeve v. Attorney General*, 2 Atk. 223, Lord Hardwicke said, "I remember a case in the Court of Exchequer, when I was Attorney General, in which Mr. Lutwich the counsel, was the plaintiff. His father had a mortgage in fee on Sir William Perkins's estate, who was attainted for high treason, on account of the assassination plot.

Mr. Lutwich brought his bill to foreclose, and made the Attorney General a party. The Court would not decree a foreclosure against the Crown, but directed that the mortgagee should hold and enjoy the mortgaged premises till the Crown thought proper to redeem the estate."

Thus it appears to me, that if I am right in attributing to the payment and assignment of the mortgage the character of a redemption of the estate from the mortgagee, which I should upon this evidence find without hesitation as a matter of fact, there is no legal obstacle to our treating the land in the hands of the defendant as part of the personal estate, if for any purpose it is necessary so to regard it; but at all events as belonging to the estate of Duncan, and as such passing to the plaintiffs, subject only to the defendant's charge upon it for whatever may be properly payable to him in respect of money advanced towards its redemption.

MORRISON, J. A.—I agree with the views which have been fully expressed by his lordship the Chief Justice and by my brother Patterson, and concur in dismissing this appeal, with costs.

*Appeal dismissed, with costs.*

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## COOPER V. DIXON.

*Trust deed for benefit of creditors—Assent of creditors.*

A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his endorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent to or knowledge of it by any creditor shewn.

*Held*, affirming the judgment of the County Court, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor: but, *Seemle, per* PATTERSON, J. A., that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable.

THIS was an interpleader issue to decide the ownership of certain wheat and straw, as also of growing crops of wheat, pease, oats, and barley, claimed by James Graham Cooper, and seized by the sheriff of the county of Bruce, on the 9th of August, 1882, under a writ of *fiery facias*, issued at the suit of Thomas Dixon against the goods of one Paul Ross.

The issue was tried before J. J. Kingsmill, Esq., Judge of the County Court, without a jury, on the 13th of December, 1882.

James G. Cooper, the plaintiff, was called as a witness on his own behalf and swore: "I claim under deed from Paul Ross to me, (produced) \* \* signed by Ross and myself. I was a mortgage creditor. Deed grants all effects real and personal to me in trust \* \* I thought I took possession and placed Ross in charge of the Brant farms, and wished him to employ men to save the crops. Next day I appointed Mr. Craster Ross to save pea crops in Greenock. I notified the tenant of house on land. \* \* On 9th August I understood Dixon seized, and I found I could not hold some chattels seized."

A verdict was entered by consent for the defendant, with liberty, however, to move to enter a verdict for the plaintiff.

Subsequently and on the 2nd of January, 1883, a motion was made accordingly in term, and the Judge after taking time to look into authorities, on the 3rd of February, 1883, gave the following judgment:—

“ This is an interpleader which came up before me without a jury at the December sittings, when it appeared that the claimant Cooper sets up title to the goods seized, namely, crops of wheat, oats, pease, and barley, under the assignment executed 4th August, 1882, made by Paul Ross to the claimant, and which purports to assign the lands on which the crops in question grew as well as chattels generally for the benefit of creditors. Dixon’s execution was placed in the sheriff’s hands on the 9th August, and the sheriff on the same day seized the crops in question, then being cut, the claim being confined to the crops that were growing on the 4th August, no claim being made to those cut before the 4th August, and they are not now in question.

“ Upon the close of the claimant’s case, counsel for Dixon, the execution creditor, moved for judgment for defendant on several grounds, and, as there were several questions of law arising, it was by consent, and as according with my view of the law and facts, that a verdict was entered for the defendant, with leave to move to enter a verdict for claimant on law and facts. In January term, Mr. O’Connor, for claimant, obtained a rule in accordance with the leave reserved.

The grounds on which Mr. Robertson moved upon the trial for a judgment for the defendant were :

1. Deed of assignment void, because it was never assented to by any creditors, Cooper not being a creditor.

2. Assignment purported to be signed by parties of third part and was never completed—no party of the third part having ever executed it ; if assent without execution sufficient, it would only be in those cases where the instrument does not make creditors parties.

3. Assignment void, because not registered, and no immediate and continued change of possession shewn.

4. No description of property so as to identify it readily ; crops not mentioned in the deed of assignment.

5. Deed void because trustee is by the terms thereof enabled to pay any creditor in full who has a lien for even a part.

6. Void because the trustee is enabled to carry on business indefinitely and thus perhaps exhaust the whole estate.

7. Because the creditors have no power to compel the trustee to do anything not provided for by the deed.

Upon moving his rule absolute Mr. O’Connor, for claimant, took the ground that the crops growing and uncut at

the time of the execution of the deed by Ross to Cooper passed to Cooper with the land, and were not claimed as chattels, but as land, or part of it, and should be so treated, and such crops so passing with the deed no registration was necessary, and no change of possession such as is requisite in the case of chattels; and referred to *Stewart v. Hunter*, 2 Ch. Chamb. 336; *McDowall v. Phippen*, 1 O. R. 143; *Hodgson v. Gascoigne*, 5 B. & Ald. 88; *Davis v. Eyton*, 7 Bing. 154; *Stevenson v. Bain*, 8 P. R. 258; *Richardson v. Trinder*, 11 C. P. 130; *Cooper v. Woolfitt*, 2 H. & N. 122; *Fisher v. Trueman*, 10 U. C. R. 617; and contended that all the cases that have been before our Courts have been with reference to goods only, and that the Act c. 118 R. S. O. does not apply except as to personality, and these crops should not be treated as personality. and, being realty, then other proceedings would be necessary to set aside the deed of assignment, which cannot be done in the present suit in this Court.

Let us examine how far the cases, Mr. O'Connor referred to, go.

In *Stewart v. Hunter*, 2 Ch. Ch. 336, it was held that the growing crops on land are part of and go with the freehold when it is sold; where therefore a tenant in possession at the time of sale carried away growing crops compensation was granted to the purchaser out of the purchase money.

*McDowall v. Phippen*, 1 O. R. 143, upon default made in payment of a mortgage the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to hold the whole as his security. This case was determined, not on the law applicable to vendor and purchaser, but on the law peculiar to mortgagor and mortgagee. Boyd, C., says, "As between vendor and vendee it might be important to consider the question discussed in *Stephenson v. Bain*, 8 P. R. 258. as to when the contract was completed." A late case, *Bagnall v. Villar*, 12 Ch. D. 812, is to the like effect. There a mortgagor presented a petition for liquidation of his estate, and the trustee went into possession of the mortgaged lands and commenced cutting the crops; the mortgagee then put a man in possession and required the trustee to give up possession, which he declined to do. In an action against the trustee an injunction was granted restraining him from cutting the crops, and from removing crops cut after the demand made by the mortgagee.

*Stephenson v. Bain*, 8 P. R. 258. A purchaser at a sale made under decree signed the usual contract of purchase, and paid the deposit; the next day the buildings were burned down. Held that the loss would not fall on the purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed. This case shews that the law is, that until the report on sale is confirmed the crops would not pass to the purchaser, and from that we are to draw the inference that upon the execution of the deed, which would be as strong as the confirmation of report, the crops did pass to Cooper, and so *Richardson v. Trinder*, 11 C. P. 130, which is to the same effect, shews that until the sale has been confirmed the purchaser is not entitled to crops.

*Hodgson v. Gascoigne*, 5 B. & Ald. 88, is relied on as shewing that the sheriff could not properly seize the growing crops, as the land had been conveyed by Ross to Cooper previous to the receipt by the sheriff of the *fi. fa.* In that case the sheriff had an execution against the tenant of the freehold and levied on the growing crops. Subsequently the landlord placed a *hab. fac. pos.* in the sheriff's hands, and it was held that from the day of the demise laid in the declaration the tenant was, in the eye of the law, a trespasser, and that the sheriff was not liable for not selling the growing crops, or as Wilson, J., says in *Robinson v. Fee*, 42 U. C. R. 455, construing this decision, "When the sheriff executes a writ of possession the growing crops pass with the land to the person who gets possession."

So in the case *Doe d. Upton v. Witherwick*, 3 Bing. 11, it is said: "So crops grown on the land of which possession is given, and severed since the day of demise laid in the declaration, or since the time the plaintiff's title has accrued, and still upon the land at the time of the *hab. fac. pos.* executed, may, it seems, also be delivered to the plaintiff with the land."

Then turning to *Cooper v. Woolfitt*, 2 H. & N. 122. In that case it was held that where a testator had devised land to W., and bequeathed all his moneys, &c., personal estate and effects whatsoever and wheresoever not therein specifically bequeathed, there being no specific bequest of crops growing on the land, the devisee of the land was entitled to the emblements growing upon it at the time of the testator's decease. It was there stated by Pollock, C. B., that a devisee takes more than an heir would have



done, for he is not *hæres factus* but takes by conveyance, and is therefore entitled to everything which is appurtenant to the land, and as such to all crops growing on the land at the time of the testator's decease, unless it appears with a certainty that the testator intended some one else to take them.

Channell, B., says: "The law is stated in Sheppard's Touchstone, by Preston, p. 472, 'As between executor and devisee the emblements belong to the devisee unless they are expressly bequeathed.'"

*Dart* on V. & P., 5th ed., page 132, lays down very clearly that if the property be in lease at the time of sale, the purchaser will of course be subject in these respects to the rights of the tenants; if, however, it be in hand, and nothing be said as to the crops, they will belong to him from the day fixed for completion.

Let me now add another case and shortly refer to *McDougall v. Waddell*, 28 C. P. 201, Hagarty, C. J., there says: "It was objected, but hardly argued, that a Division Court execution could not attach on growing crops. The right to seize growing crops in execution against goods does not appear to rest on any Statute, but to be a common law right. The growing crop is treated as a chattel. *Chief Baron Gilbert's* Book on Execution, page 19, says: 'By this writ (*fi. fa.*) the sheriff's have authority to seize everything that is a chattel, viz., leases, *fructus industriales*, as corn growing.' \* \* We are not aware," says the learned Chief Justice, "of any Canadian statute on the subject. \* \* \* Growing crops are therefore to be treated as goods and chattels, and as such are seizable in execution against goods."

From the foregoing cases I think we may say:

1st. Had the conveyance from Ross to Cooper been an ordinary *bona fide* sale of land for value, and deed executed and delivered on the 7th August, no doubt the purchaser could hold the crops uncut at the time of the purchase, against the sheriff's seizure under a writ of *fi. fa.* goods placed in his hands on the 9th of the same month; and, 2nd, That had there been no deed or assignment whatever the sheriff could have properly seized these crops while unsecured.

We must then consider what is there in connection with the deed from Ross to Cooper that will prevent its having the usual effect of a *bona fide* conveyance for value, and whether this Court can take cognizance of such imperfec-

tions. It is contended, and under the authorities I think well contended, that R. S. O., c. 118, sec. 2, does not refer to land. See *McNabb v. Peer*, 19 U. C. L. J. 35. (32 C. P. 545.)

But there are objections raised to this assignment that, it is contended, apply to the validity of its operation not only as a transfer of chattels, but as a deed of land, and grounded upon the following facts :

(a) The document in question recites that the assignor has contracted debts that he is unable to pay in full.

(b) The said deed is executed by the assignor and Cooper, assignee, only.

(c) No attempt was made at the trial to shew that any other person was consulted, or had consented to, or had been notified of, the assignor's intention to assign ; and Mr. Cooper, the claimant and assignee, upon his examination said, that he was a mortgagee, the mortgage having been given to secure his indorsation on notes at The Bank of Commerce, current at the time the assignment was executed.

Now, without quotations from them, let me say that on the strength of the cases, *Sylvester v. Cockburn*, 1 A. R. 471 ; *Lewis v. Tudhope*, 27 C. P. 505 ; *Evans v. Ross*, 30 C. P. 121, I have come to the conclusion that Cooper was not at the time of the execution of the deed a creditor, and that therefore no creditor having intervened the deed was revocable.

See also *Siggers v. Evans*, 5 E. & B. 367 ; *Harland v. Binks*, 15 Q. B. 713 ; *Maulson v. Tapping*, 17 U. C. R. 183 ; *Andrew v. Stuart*, 6 A. R. 495.

In the case of *Andrew v. Stuart*, lands as well as chattels were assigned, and I find no difficulty expressed by any of the learned Judges as to dealing with it.

C. J. Spragge says : " The short question is, whether the assignment is a deed of agency or management, in which case it would be revocable by Biggar, and the property conveyed his property, upon which the defendant's execution would operate, or a deed of trust, of which the creditors of Biggar would be *cestuis que trustent*."

And this is the question here to be decided, whether the deed to Cooper was simply a deed of agency or management, or a deed of trust, of which the creditors of Ross were *cestuis que trustent*.

This matter is treated of in *Watson's Compendium of Equity*, page 894, where it is said that the disposition of



property for the payment of debts is not fraudulent under 13 Eliz., c. 5, and goes on to say, "One important question which frequently arises as to the effect of such deeds is, how far they are revocable." As to this, it has been held that a conveyance for the benefit of creditors is revocable if it has not been communicated to them, and refers to various cases, reference to which I have already made, or which are quoted in the cases I have cited.

I think that upon the law and facts I must hold that this deed was merely a deed of agency or management—a revocable, voluntary instrument—the relation of trustee and *cestuïs que trustent* not having been established between the claimant and the creditors of Ross, and therefore void as against the defendant, and therefore the property is liable to be treated as Ross's, and as such subject to execution; and if subject to execution as if in Ross's hands, then the crops as laid down in *McDougall v. Waddell*, were liable to be levied upon as chattels, and the claimant's case must fail.

There are other objections to the assignment treated as an assignment of chattels, and there can be no question, I think, but that there was no immediate and continued change of possession of any chattels covered by the assignment such as would satisfy the statute, and the registration without affidavit of execution would certainly be valueless, as that is specially required by section 5 of the Act, respecting mortgages and sales of personal property.

We must further consider the effect of the clause in the assignment, which reads as follows: "Provided, and it is hereby declared, that the said trustee shall have the right to pay in full, whenever he deems it advisable, any claim or debt which by law constitutes a lien or charge upon any part of the said property or assets."

Under this clause it is contended, and I think with reason, that a creditor for a large sum having a lien upon a very trifling portion of the estate, might be paid in full out of the general assets.

In *Andrew v. Stuart*, 6 A. R. 508, before referred to, Mr. Justice Patterson, speaking of the clauses in the deed then under consideration, which postpone the general creditors to those who are called the present execution and other privileged creditors, says: "The term 'execution and other privileged creditors,' whatever class it may be intended to denote, is clearly capable of including creditors who had not at the date of the deed taken property in

execution, or otherwise acquired a lien or charge upon it.  
 \* \* \* Besides this, these privileged creditors are given the right to be paid out of all the effects assigned, which include book debts, which were not liable to seizure under execution."

This reasoning is, I think, applicable to the case before us.

Mr. Justice Burton, in the same case, refers to various reported decisions in our Courts, and says that "even though the assignment be made *bona fide*, the debtor has no right to dictate to his creditors the terms upon which they are to take it, either in the matter of the remuneration of the assignee, or the privilege of certain creditors." See *Watts v. Howell*, 21 U. C. R. 255.

There is the further clause in the assignment, allowing the trustee in his discretion to carry on the business for an indefinite period, purchase goods and pay agents.

This clause, on the authority of *Hendry et al. v. Harty*, 9 C. P. 520, renders the assignment clearly bad, as rendering possible an indefinite delay. So in *Cornwall v. Gault et al.*, 23 U. C. R. 81, Morrison, J., says: "In effect the plaintiff is not bound to wind up the estate within any fixed period; but the winding up is contingent upon events and circumstances which may take years, and may be prolonged to an indefinite period." I would also refer under this head to the case just decided in C. P. Div., Ont., see 19 U. C. L. J. 83, viz.: *Gallagher v. Glass*, in which lands as well as chattels were assigned, and which, as far as can be gathered from the short report given, follows in principle the cases above referred to (a).

Should there exist any technical difficulty, and supposing that it should be found necessary to set aside the deed before the land be reached, which I do not think possible, as in my opinion the document as against creditors is void, yet the assignment of the chattels and the land being by one and the same document, the assignment being of the whole of the debtor's estate, and alleged to be for the one single purpose, and the whole estate then passing into the hands of the agent or manager for the liquidation of the debts of the assignor, I think that what would have been treated as chattels in the assignor's own hands, may safely be treated as chattels in the hands of such agent or manager.

(a) And see this case reported 32 C. P. 641.

The plaintiff thereupon appealed to this Court, assigning, amongst others, the following reasons therefor:

1. That the crops, the subject of this action, were growing at the time of the execution of the deed from Ross to Cooper, upon the lands mentioned in said deed, and so passed as part of the realty to Cooper, and no registration of said deed, and no change of possession of said crops, was necessary. 2. The said deed was registered in the proper Registry Office in that behalf, on the 5th day of August, 1882, and was notice to all persons. R. S. O., chap. 111, sec. 78; 3. C. S. U. C. chap. 26, sec. 18, and R. S. O., chap. 118, sec. 3, do not apply to real property: *McNabb v. Peer*, 32 C. P. 545. 4. That the said deed never having been set aside or annulled by any Court of competent jurisdiction, the said goods remained the property of said Cooper. 5. That the said deed was not a deed of agency or management, but was a deed from Ross to Cooper for the benefit of the creditors of Ross. 6. That the said Cooper was a creditor of the said Ross. 7. That the learned Judge of the county of Bruce should have received evidence to shew that the creditors of Ross consented to the terms of the said deed.

The appeal came on to be argued before this Court on the 26th of May, 1884.\*

*Moss*, Q. C., for the appellant.

*Beaty*, Q. C., for the respondent.

The cases cited appear in the judgment of the Judge of the County Court, and in the present judgment.

September 5th, 1884. HAGARTY, C. J. O.—This is an appeal from the county Court of Bruce. It is an interpleader issue to try the right to certain wheat and straw and growing crops, seized by the sheriff on 9th August, 1882 on a *fi. fa.* issued the same day at the suit of the defendant against the goods of Paul Ross.

\**Present*.—HAGARTY, C. J. O., BURTON PATTERSON, and MORRISON, JJ. A.

Plaintiff claimed under a deed of assignment to him as trustee for creditors executed by Ross on 4th August.

The sheriff seized wheat in straw in the barn, and also growing crops of wheat, oats, pease, and barley.

The deed was executed five days before seizure is made between Ross, of the first part; the plaintiff, therein called the trustee, of the second part, and the several persons respectively creditors of the debtor of the third part; reciting that the debtor had contracted debts which he could not pay in full, and had consequently agreed to assign all his estate, &c., to the said trustee on the trusts mentioned. In consideration of \$1 he assigns to the trustee his real and personal estate, stock in trade, &c., on trust to sell as the trustee may think proper, &c., &c., and after payment of expenses, &c., to pay and apply the balance equally without preference, &c., towards the payment of the debts of the said debtor in proportion to their respective amounts; with other provisions.

The deed was executed by the debtor and the trustee. No creditor signed, and there was no proof whatever of any consent, written or verbal, by any creditor to the assignment, nor any communication respecting the same with or to any creditor.

But it was contended that the plaintiff, the trustee, was himself a creditor, and therefore the deed was not revocable.

The only evidence on this point is that of plaintiff. He says: "I was a mortgage creditor \* \* I was a mortgagee given to secure my indorsement on notes at 'Commerce' current at the time of assignment, and I was indorser on the notes."

This alleged mortgage was not put in evidence. No description whatever is given of its provisions or conditions, or as to when, if ever, default has been made. Plaintiff states that at the time of the assignment it was to secure him on paper then current which he had indorsed. Nor does it appear what property was included in it, beyond an exhibit marked "B." in the appeal book, which reads thus: "Notice of sale, dated 3rd November, 1882

under power of sale contained in the mortgage made by Paul Ross to J. C. Cooper for securing the payment of certain promissory notes made by Ross and indorsed by Cooper." The lands covered by the said mortgage being the same as are described in exhibit A. (the assignment.)

It is clear, however, on the plaintiff's own shewing that when he took the assignment for creditors no debt was due to him.

On the face of the assignment it could not be assumed that he was a creditor. He is treated as a mere trustee for others to whom Ross was indebted. Nor does the assignment in any way suggest that he had any prior charge or lien on any of the property, real or personal, assigned.

Even if we assume the alleged mortgage to be in evidence, I think the learned Judge in his very carefully considered judgment has rightly held that he was not a creditor of Ross in the sense contemplated in the assignment, or in any legal sense sufficient to support a deed like this, or to prevent its being revocable.

The authorities cited by the learned Judge down to *Andrew v. Stewart*, in this Court, 6 A. R. 495, I think established both the propositions: 1st. That the claimant cannot be considered a creditor, and, 2nd. That the assignment was a deed of agency and management; a revocable and voluntary instrument, and void as against the defendant, an execution creditor.

At the time of the assignment the crops were partly cut and partly in the ground almost ready for harvesting. If the assignment be void I cannot see anything in the evidence to shew that the claimant—apart from the assignment—had any right or claim as against an execution creditor. The learned Judge has fully stated the authorities, and as his judgment will be reported with our decision, I do not think it necessary to repeat them here.

There is another important point taken against this assignment as to allowing the trustee to carry on the business and employ persons, and supply goods, &c., until he may



think it advisable to dispose of it. If this stood alone it would require much consideration. We have the same point for decision in another case, and my own opinion on it has already been fully expressed in the case cited, *Gallagher v. Glass*, 32 C. P. 641.

This point and others taken at the trial need not, I think, be further discussed.

I think the appeal should be dismissed, with costs.

On the trial of this interpleader as to title to the chattels seized, the Court had necessarily to examine as to the assignment, which professed to convey both real and personal property.

The case cited by Mr. Beaty, *Munsie v. McKinley*, 15 C. P. 3, is directly in point.

PATTERSON, J. A.—I agree that this appeal should be dismissed on the ground that upon the case before us we are bound to hold the deed voluntary and revocable, and therefore void against creditors under 13 Eliz. cap. 5, because it is not shewn to have been communicated to or assented to by any creditor of the assignor, and because the assignee in trust is not shewn to have been interested either as a creditor or otherwise in the execution of the trusts.

I desire, however, to guard myself from being understood to hold that, when the only assent to such a deed is that of the trustee, it is essential that he should be a creditor in the strict sense in which the language of particular statutes touching the relation of debtor and creditor has been construed in cases decided in this Court, and cited to us in the argument.

I am inclined to the opinion that if the present plaintiff, when he executed the deed as grantee in trust, had been interested in the application of the property to the payment of the debts, as he would have been if he had been a surety, unsecured, for the payment of one of the creditors, his acceptance of the assignment would have rendered it irrevocable. I think the language of more than one of the



learned Judges who decided the case of *Siggers v. Evans*, 5 E. & B. 367, but particularly that of Lord Campbell, support that view. Thus in one passage (p. 379) he says 'We think that the doctrine of the deed being considered a mere power in the hands of a mandatory, or agent, revocable until the deed is communicated by the agent or assented to by the creditor, does not apply to a case where the deed is made to one who has a beneficial interest under it. Such a person cannot be considered as a mere mandatory within the rule as to revocation as laid down by Lord Eldon in *Wallwyn v. Coutts*, 3 Mer. 707, and referred to by Sir L. Shadwell in *Garrard v. Lord Lauderdale*, 3 Sim. 7, as the foundation of his decision."

The facts before us do not make it necessary to form a more positive opinion, because the plaintiff does not appear to be beneficially interested. He is, it is true, indorser upon promissory notes of the assignor, which were current when he took the assignment. We know that, not from the deed, but from his own evidence, and he shews that he was secured for this liability by mortgage of property which was also included in the assignment, his claim therefore being prior to that of any creditor for whom he was trustee.

I infer that his mortgage was on some of the assigned property, not only from the terms of the deed which cover all the real estate of the assignor, but from the plaintiff's statement in his evidence when he said: "My instructions were to sell under the mortgage, not under the assignment."

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## PALIN V. REID.

*Innkeeper—Gratuitous bailee.*

The plaintiff had been for sometime a guest of the defendant, an innkeeper, and on leaving the inn, after paying his bill, was allowed to leave a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing luggage, &c., the plaintiff intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost, there was no other evidence of any negligence in the matter.

*Held*, reversing the judgment of the County Court, that the plaintiff could not recover.

THIS was an appeal from the judgment of Z. Burnham, Esq., Judge of the County Court of the County of Ontario, sitting for the Judge of the County Court of the County of York, whereby an order *nisi*, obtained by the plaintiff, to set aside the verdict for the defendant, and to enter judgment for the plaintiff, was made absolute, and a verdict ordered to be entered for the plaintiff for \$50 with full costs.

The plaintiff by his statement of claim set forth that the defendant was an hotel keeper in the City of Toronto, and that on or about the 15th of September, 1882, the plaintiff on leaving the hotel of the defendant, where he had been for some time a guest, left with the said defendant a certain box containing books, papers, and other articles, amounting in value to the sum of \$150 or thereabouts, and also two wire blinds, in order that the defendant might take charge of the same for the plaintiff until such time as he should send for them; and the defendant accepted the same, and undertook and promised to keep the same safely for the plaintiff: that on or about the 10th of November, 1882, the plaintiff demanded the said box and blinds from the defendant, and the defendant delivered up the said blinds but failed to deliver up the said box, or give an account of the same; but informed the plaintiff, as the fact was, that the same had been lost. And the plaintiff claimed that he was entitled to a return of the said box, but the defendant had refused to return the same, neither had he kept the same safely as promised.

The plaintiff claimed \$200.00 damages for the detention and loss of the box and contents, and further relief.

The defendant by his statement of defence denied receiving the box as alleged; and set up that the plaintiff when he paid his bill at the plaintiff's hotel quitted the hotel, and thereby put an end to the relationship between himself and the defendant of innkeeper and guest.

The action came on for trial before the learned Judge without a jury, who, after hearing the evidence of the witnesses called in the case, the effect of which is stated in the judgment, entered a verdict for the defendant.

In the following April term the plaintiff moved to set that verdict aside, and enter a verdict for the plaintiff, which the Judge by order of the 6th of April did, and directed the verdict to be entered for \$50 damages.

The defendant thereupon appealed to this Court, on the ground chiefly that defendant was only a gratuitous bailee, and was only liable for gross negligence; and that culpable negligence was out of the question, as the evidence completely negatived any such on the part of the defendant.

The appeal came on to be argued before this Court on the 26th May, 1884.\*

*Osler*, Q. C., for the appeal.

*Delamere*, contra.

*Lane v. Cotton*, 12 Mod. 472; *Rosenplanter v. Roessle*, 54 N. Y. 262; *Fowler v. Dorlon*, 24 Barb. 384; *Brind v. Dale*, 8 Car. & P. 207; *Beardsley v. Richardson*, 11 Wend. 23; *Lynar v. Mossopp*, 36 U. C. R. 230; *Wintermute v. Clarke*, 5 Sandf. 242; *Gelley v. Clerk*, Cro. Jac. 188, were referred to.

May 30, 1884. HAGARTY, C. J. O.—This case falls within the class of cases where the bailment of goods is for the benefit of the bailor alone, and where the bailee is responsible only for gross negligence. Exception is often taken

\* *Present*.—HAGARTY, C. J. O., BURTON and MORRISON, JJ. A.

to the use of the word "gross." At all events we may consider that the liability can only arise from actual clear negligence.

The gist of the action here is negligence. The statement of claim does not aver any negligence, but merely that the goods were lost. I hardly think that it discloses a good cause of action. The goods may have been lost without defendant's neglect.

If I were a juror in a case like this, I would unhesitatingly find for defendant. At the best the evidence, taken as favourably as can be for plaintiff, is equally consistent with the absence as with the existence of negligence, and the well known rule should apply.

If such be the aspect of the evidence, the defendant can only be made liable as an insurer of the safety of the goods.

It may be urged that as the goods were shewn to have been left with him he was bound to give some account of the loss. This is the very thing of which neither he nor the plaintiff can give any account. We must remember the circumstances of the deposit. An innkeeper of a much frequented hotel is asked to let a box stay there three or four days for plaintiff's convenience. It was left in the regular baggage room with other guests' luggage. People and luggage were constantly coming and going. The goods were left for several weeks at defendant's, and then when inquiry is made nobody can give any account whatever of how they were lost.

There was no evidence that defendant managed his hotel business negligently, or that there was any want of usual care as to goods of guests or others, or of goods left with the goods of guests in the hotel.

No evidence was kept back, all available witnesses seem to have been examined. There is no suspicion whatever of any bad faith.

It seems to me that if ever there was a case in which the evidence was equally consistent with the absence as with the presence of negligence, this is one. And as the proof of negligence is essential to the right to recover, no

verdict for the plaintiff should be rested on mere surmise or guess.

I think the appeal should be allowed.

BURTON, J.A.—There is no pretence in this case for holding the defendant liable as an inn-keeper. The relationship of inn-keeper and guest had ceased before the permission was obtained to leave the property upon the premises, and his liability, if any, is purely that of a gratuitous bailee.

The plaintiff's witness Miller says, "I merely asked him if I might leave it till such time as I could take it away to King Street," and the defendant answered "Yes you can leave it here until such time as you get your office ready."

One of the porters says he saw it in the sitting room some days after it was left by Miller, and says he should have thought it quite safe to leave a box of that size there, and goes on to describe that it was a heavy box that would require two men to carry it.

It is clear that all that was contemplated by any of the parties at that time was, that the goods should remain for a few days, and no notice was given to the defendant that the contents were valuable.

The plaintiff himself admits that he intended taking them away on the following Monday, but he was taken ill with typhoid fever on that day, and rendered incapable of attending to anything for several weeks.

The defendant left shortly afterwards for England, and on his return the plaintiff met him one day on King Street, and told him that he had been down to the hotel for the box he had left, but could not find it.

The defendant denies positively that the box was left with him, and all that he said to the plaintiff was, that if it had been left there he supposed it would be all right; but on making inquiries he could hear nothing about it.

This was the substance of the evidence. No actual negligence was shewn beyond the fact that the box was



left in the sitting room in which other baggage of a heavy kind was placed.

The hotel keeper had a room specially for baggage, but for baggage thus deposited it was the practice to grant checks; and there was a notice in the bar that the proprietor would not be responsible for baggage unless actually given in charge at the office, and checks or receipts given for the same, and this notice Miller admits that he saw.

There is no case, that I am aware of, which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property as a reasonably prudent and careful man may fairly be expected to take of his own; and if we find upon the evidence that he did keep the box in the same manner as he kept his own, it goes a great way to dispel any presumption of gross negligence. It is shewn that it was the practice to leave heavy baggage in the room where this box was left, and it is sworn that it was considered perfectly safe to leave goods of this kind there.

There is no evidence of any kind to shew how the box was lost, and it would seem to me to be imposing upon this defendant a degree of responsibility, far beyond that required of a gratuitous bailee permitting another for his own benefit to leave goods upon his premises, if we were to hold him responsible for damages resulting from their loss without some actual proof of negligence on the part of himself or his servants.

I should have thought that as the plaintiff's agent was aware of the notice that there was a place for the safe keeping of goods where the defendant undertook to be responsible for them, that he voluntarily assumed the risk of leaving the box where it was left.

The learned Judge came to the conclusion at the trial that the defendant was entitled to a verdict, but he subsequently in term set it aside, and entered a verdict for the plaintiff with \$50 damages; but he has given no reasons either for his first finding or for his subsequent change of opinion. Upon a very careful consideration of the evi-

dence I am unable to find anything to establish negligence of any description on the part of the defendant, which it was incumbent upon the plaintiff, in a case of this description, to establish affirmatively. And however unwilling one may feel to interfere with the decision of a learned Judge who has come to a conclusion as in this case upon the facts, we cannot avoid holding that it was one which, if there had been a jury, must necessarily have been withdrawn from them on the ground, that the plaintiff had offered no evidence to establish a case of gross negligence against the defendant.

The appeal is therefore allowed with costs, and the rule to set aside the verdict discharged.

MORRISON, J. A., thought there was no evidence whatever to charge the defendant with negligence, and therefore concurred in allowing the appeal.

*Appeal allowed, with costs.*

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## FARROW V. TOBIN.

*Execution—Interpleader proceeding—Damages.*

The defendant, as bailiff of a Division Court, under an execution against plaintiff's father, seized two horses, waggon, &c., which, on an interpleader proceeding, were decided to be the goods of the plaintiff, who at the end of three weeks obtained possession of them from the bailiff. In an action brought by the plaintiff against the defendant for damage done to the horses during the time they were in his possession, the jury, under the direction of the Judge, found a verdict for the plaintiff and \$80 damages, which verdict the Judge subsequently refused to set aside.

*Held*, (affirming the judgment of the County Court), that the finding of the Judge on the interpleader proceedings formed no ground of defence to the suit for damages for the alleged injury to the property.

THIS was an action instituted in the County Court of the County of Perth by Douglas Farrow against Thomas S. Tobin.

The statement of claim filed by the plaintiff set forth that on the 17th of August, 1881, the defendant seized one bay horse, one grey horse, one waggon, and one set of double harness, the property of the plaintiff, and afterwards returned the same: that on 31st August, 1881, the defendant seized and took possession of the bay horse, grey horse, waggon and harness, but did not remain in actual possession; and also that on 1st September, 1881, the defendant seized and took actual possession of the said bay horse, grey horse, waggon and harness, and retained possession thereof until the 24th of the said month of September, and that the defendant asserted that when he made such seizures he did so as bailiff of the first Division Court of the County of Perth because he considered them to be the goods of one Howard D. Farrow, against whom he had an execution.

The plaintiff also claimed that while the horses were in defendant's possession they were so negligently and badly kept and cared for that they sustained injury and damage and became depreciated in value.

The statement of defence alleged that the defendant was bailiff of the first Division Court, County of Perth, and that on the 16th August, 1881, the Bank of Commerce obtained

judgment in that Court for \$152.50 debt and \$3.88 costs against Howard D. Farrow, and on the same day an execution issued to defendant in that suit against said Farrow, and defendant seized the goods mentioned under it. That the plaintiff was a son of Howard D. Farrow, and at the time of such seizure was a member of Howard D. Farrow's household, and the goods appeared to be under the control of Howard D. Farrow.

The defendant further alleged that on the plaintiff making claim defendant applied to the Division Court Clerk for an interpleader summons, who issued such summons; and the issue was tried at Stratford Division Court on the 24th of September, 1881, when the County Court Judge adjudicated on the claim and gave judgment for the claimant the plaintiff in this action; and the defendant thereupon released the goods, and while defendant had possession the horses were well fed and cared for, and they suffered no injury or damage.

The case was tried at the County Court sittings on the 16th day of June, 1882, before Judge Lizars and a jury, when a verdict of \$80 was entered for the plaintiff.

In July term following, the defendant applied for and obtained an order *nisi* to set aside the verdict and enter a nonsuit, pursuant to leave reserved or to enter a verdict or judgment for the defendant, or for a new trial, which order was argued in January term, 1883, and in the April term following was discharged.

The defendant thereupon appealed to this Court, and the appeal came on to be argued on the 27th May, 1884.\*

*J. P. Woods*, for the appellant, contended that the evidence constituted a complete defence to the action; and that the adjudication upon the claim of the plaintiff in the interpleader proceedings in the Division Court as set forth in the statement of defence, was final and conclusive, and the defendant was entitled to have a nonsuit entered in the

\**Present*.—HAGARTY, C. J. O., BURTON and PATTERSON, JJ.A.

same manner as he would have been entitled to have proceedings in this action stayed had it been instituted before that adjudication. Chap. 47 R. S. O., points out distinctly the course the bailiff is to pursue where a claim is made to goods seized. Here the defendant pursued that course, and there is no evidence to shew that he acted unreasonably or negligently. On the contrary, the evidence establishes that any damage sustained by the plaintiff might have been avoided by giving the bond specified in the statute.

*Smith*, Q. C., for the respondent. The only question discussed in the Division Court was that of property in the goods seized. No question was raised therein as to damage sustained by the owner in consequence of the negligent conduct of the bailiff while the goods were in his possession under the seizure.

*Washington v. Webb*, 15 U. C. R. 232; *Schamehorn v. Traske*, 30 U. C. R. 543; *Keane v. Steadman*, 10 U. P. 435; *Harmer v. Cowan*, 23 U. C. R. 479; *Tinkler v. Hilder*, 4 Ex. 187, were referred to.

June 3, 1884. The judgment of the Court was delivered by

Hagarty, C. J. O.—Appeal from the County Court of the County of Perth.

The action was against the bailiff of a Division Court for seizing goods on an execution in that Court against plaintiff's father. Two horses, a waggon, and harness, were seized and detained by defendant from the 1st to 24th September. Damage to the horses is claimed from being negligently and badly kept.

Other property was seized at the same time, and plaintiff claimed more than the property now in dispute. The bailiff obtained an interpleader summons on the parties, and on the hearing the County Judge decided that the goods in question in this action were plaintiff's property. The other property was not his.

No order was made as to damages or costs apparently.

The plaintiff thereupon afterwards got back his property



from the bailiff, and on 19th November, 1881, this action was commenced.

The adjudication of the Judge was pleaded and urged at the trial as a complete defence.

It does not appear that any claim for damage was made by plaintiff at the interpleader proceeding.

The learned Judge told the jury that the Division Court proceedings shewed the plaintiff's right to the property and that he was entitled to a verdict for the wrongful seizure, damages for loss in having to hire other horses, &c., and for any injury while under seizure.

The verdict was for plaintiff for \$80.

An application for a new trial was then made and refused, and the defendant appeals.

The only question for us is whether the adjudication in the Division Court was a bar.

Our Division Court Act, R. S. O. ch. 47, sec. 210, declares that in case a claim be made to or in respect of goods, &c., taken in execution, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process issued, upon application of the officer &c., whether before or after the action has been brought against him, the Clerk shall summon as well the party issuing the process as the party claiming, and thereupon any action which has been brought shall be stayed. \* \* \*

The County Judge shall adjudicate upon the claim and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him seems fit \* \* and such order shall be final and conclusive between the parties, except that the creditor or claimant (not the Bailiff) could apply for a new trial.

The Imperial County Court Act was worded similarly to ours until the 30-31 Vict., c. 142, when section 31 had the words added to the Judge's power to adjudicate, "and shall also adjudicate between such parties or either of them and the high bailiff in respect of any damage or claim of or to damages arising, or capable of arising out of the execution

of such process by the High Bailiff, and make such order in respect thereof and of the costs of the proceedings as to him shall seem fit."

No case has been cited to us in which the point has come before our own courts. *Washington v. Webb*, 16 U. C. R. 232 was relied on by appellant. There an adjudication was made by the County Court Judge in the Division Court suit. On the hearing it is stated that the Judge asked the claimant, the now plaintiff, whether he claimed damages for the seizure, and being answered that he did, the Judge thereupon awarded the further sum of £15 to be paid by the execution plaintiff to claimant. That sum was paid into Court, the now plaintiff not having taken it out.

Prior to the adjudication, but while the proceedings therefor were pending, the action was commenced against the bailiff. The Court of Queen's Bench stayed all proceedings in the action. Nothing was said as to the right of the Judge to award damages.

We do not find the question discussed in either *Sinclair* on Division Courts, or in O'Brien, on the same subject.

In *Schamehorn v. Traske*, 30 U. C. R. 543, the Division Court Judge adjudicated that the claimant did own certain of the goods seized, and that they belonged to him, and that no damages had been claimed.

After this adjudication the claimant commenced an action against the bailiff.

The Court refused to stay the proceedings, on the authority of *Jones v. Williams*, 4 H. & N. 706, leaving the defendant to plead the adjudication.

*Reid v. McDonald*, 26 C. P. 147, discusses the section in the Act, noticing the enlarged power given by the Imperial Act, but does not discuss the point before us.

*Harmer v. Cowan*, 23 U. C. R. 479, the adjudication pleaded in bar that the goods were not the claimant's, was held to bar the latter.

The appellant here chiefly relied on expressions of a majority of the Judges in a case of *Tinkler v. Hilder*, 4 Ex. 187, on the then Imperial Act, which was the same as ours.

But the decision was on a different ground, and the proceedings in an action by claimant against the Bailiff were stayed by the Court. The adjudication had been against the claimant.

The learned Barons expressed opinions on the Act favourable to appellant's view.

*Foster v. Pritchard*, and *Mercer v. Stanbury* 2 H. & N. 151 and 155, before the same Court, throw much doubt on the remarks in *Tinkler v. Hilder*.

Bramwell, B. in *Foster v. Pritchard*, says that in *Mercer v. Stanbury*, "We held that, assuming the County Judge to have had jurisdiction, yet if he had not in fact adjudicated upon the matter when the parties were before him on the interpleader summons, there was no ground for our interference."

The County Judge had decided that the goods were the claimant's, but had made no order as to damages.

In *Jones v. Williams*, 4 H. & N. 706, the same Court refused to stay an action brought after adjudication, leaving defendant to plead it.

*Jessop v. Crawley*, 15 Q. B. 212, seems to approve of the views expressed in *Tinkler v. Hilder*, but as there the adjudication was that the goods did not belong to claimant; and in *Cater v. Chignell*, next case in same volume, where the claimant was adjudicated to be the owner of the goods he was allowed to proceed for damages for breaking and entering his close.

*Death v. Harrison*, L. R. 6 Ex. 15, was decided under the amended Imperial Act, giving express power to adjudicate as to damages, &c., as between parties and bailiff.

The Court held these words equivalent to saying that the whole matter between the parties shall be at an end, and they had no doubt the words were inserted with that very intention. They said; "The Legislature directed this measure to meet the exigencies of common affairs, notwithstanding that in some exceptional and doubtful cases a hardship may be inflicted."

In that case the plaintiff had made no claim for special damage.

The adjudication was for the claimant, and that no action be brought against the bailiff. This was held to be conclusive, and the plea of *res judicata* upheld.

In *Jousiffie v. Bayley*, 15 L. T. N.S. 219 (1866), just before the new Act, it was held that an adjudication in favour of the claimant for one shilling damages for the seizure of his goods against the bailiff, did not bar an action for trespass to the house, and Bramwell, B., remarked that the Judge was only to decide whose the property was in the goods seized and what may be said incidentally to arise from the seizure of these goods in relation to the goods themselves, and that in any event he had not affected to deal with the claims for trespass to the house.

It seems clear to us that we cannot on the authorities properly hold that our Statute is a bar to this suit. The doubts expressed by some of the Judges no doubt caused the amendment of the law by 30-31 Vict.

The adjudication in the case before us for judgment was simply as to the ownership of the property seized; there is no claim made for or adjudicated on for damages even if the Judge could have awarded them.

Until our Legislature choose to make further provision and to give wider powers, we cannot, we think, properly accede to the appellant's contention.

Appeal dismissed, with costs.

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## O'SULLIVAN V. HARTY.

*Administration—Agent of administrator—Costs.*

In 1876 J. F. O'S. died intestate in New Brunswick, and the plaintiff—his brother—endeavoured to obtain the administration of his estate, but, owing to his financial position, was unable to do so, until the defendant W., and one J., consented to become security for him, which they did on being indemnified. Letters were accordingly granted to him, and the several securities belonging to the estate converted into money, except some English railway stock, which was handed over to the defendants, but which the plaintiff declined to assist them in realizing. In pursuance of an agreement to that effect, proceedings were instituted in one of the Probate Courts in New Brunswick with a view of ascertaining the next of kin and to obtain a final decree for the distribution of the estate, when it was ascertained that six other persons were so entitled, and on the taking of the accounts in July, 1878, it appeared that each was entitled to \$1,135.11, but owing to the plaintiff's continued refusal to join in disposing of the scrip, the defendants, in whose hands the funds of the estate had been deposited, were unable to settle with several persons entitled. The plaintiff made a claim of \$2,500 upon the estate for his commission and expenses incurred in getting in the estate, and in November, 1880, filed a bill to compel the defendants to pay \$1000 commission and his share of the estate, and also to hand over to him the shares of the other next of kin. At the hearing a decree was made declaring the defendants entitled to their costs as between solicitor and client, and ordering the plaintiff to execute all papers necessary to dispose of the railway stock; directed the defendants within two months to settle with the next of kin, other than the plaintiff, and if, after settling with the next of kin, a balance should remain in their hands, they should pay such balance to the plaintiff.

*Held*, that the defendants were in reality agents for the plaintiff, and that the other persons interested in the estate should not be called upon to pay the costs of the litigation, and the same were properly payable from the share of the plaintiff in the fund.

THE proceedings were originally instituted by Denis O'Sullivan to obtain an account of the estate of one John F. O'Sullivan, a brother of the plaintiff, who died intestate.

By a decree pronounced by Blake, V. C., at the original hearing it was:

"2. Declared that the plaintiff was entitled to an account of the dealings and transactions of the defendants in regard to the trust estate in the pleadings mentioned (being the estate of the said John F. O'Sullivan) since the first day of May, 1878.

"3. And it was referred to the Master to take an account of the dealings and transactions of the said defendants with said trust estate since the said first day of May, 1878



having regard to the declarations and directions in this decree contained, the Master to certify the balance of the said estate in the hands of the defendants or with which they are chargeable.

"4. And this Court doth further order and decree that in passing their said account the defendants be allowed to retain out of any moneys in their hands to which the plaintiff is entitled their costs of this suit as between solicitor and client to be taxed by the said Master.

"5. And this Court doth order and decree that the plaintiff do facilitate and assist the defendants in making sale of the railway scrip in the pleadings mentioned with the approbation of Wm. Marshall Matheson, one of the Masters of this Court at Ottawa, and that all necessary papers and documents for this purpose be executed in which all necessary parties are to join as the said Master may direct, and the amount realized by such sale is to be paid to the defendants and charged against them in taking the account hereinbefore directed.

"6. And this Court doth further order and decree that defendants do, within two months after the taking of the said accounts, settle the claims of the next of kin of the intestate J. F. O'Sullivan, other than the plaintiff; and in default of their so doing, the balance of the funds of the estate of the said J. F. O'Sullivan, in the hands of the said defendants, shall forthwith after the expiration of the said two months be paid by them into Court, to the credit of this cause, subject to the further order of this Court.

"7. And this Court doth further order and decree, that in the event of the said defendants settling with the said next of kin other than the plaintiff, as aforesaid, if any balance of the said estate shall remain in their hands, the said defendants do forthwith thereafter pay such balance to the plaintiff."

In proceeding with the reference it was ascertained that the defendants had since the date of the decree paid the other next of kin their distributive shares as determined by the proper Probate Court in that behalf and the Master by his report found that the next of kin other than the plaintiff had been settled with since decree by the defendants. The Master also charged all the costs of suit against the plaintiff's share. An item of \$500 allowed to the defendant Harty was the subject of some conflicting evidence before

the Master, but he reported that the Probate Court did not make any allowance to the plaintiff for this claim. This was charged against the plaintiff's share.

On appeal Proudfoot, J., held that the next of kin should not have been settled with till the Master had made his report: that the suit was virtually an administration suit, and that the costs should not have been borne entirely by the plaintiff, and that the \$500 item should be paid out of plaintiff's share.

The defendant then obtained leave to rehear the decree so as to take all accounts both before and since the determination of the Probate Court, and this was granted. It was not shewn that anything had been done under this reference, and the defendant then obtained leave to appeal from the ruling of Proudfoot, J., and the appeal came on to be heard before this Court on the 11th of June, 1884.\*

*Bethune, Q.C., and Whiting, for the appellant.*

*Moss, Q.C., and O'Sullivan, for the respondent.*

The grounds of appeal and other facts in the case appear in the judgment.

June 22, 1884. BURTON, J. A.—This is an appeal by William Harty and Charles W. Weldon, against an order of Mr. Justice Proudfoot, who, on an appeal from the Master's report, held that the Master was not right in deducting from the amount with which the defendants were chargeable, the sums paid by them to the next of kin of the late John F. O'Sullivan, other than the plaintiff, and in charging the costs of the defendants in this suit and the allowance of \$500 to Harty, against the balance in their hands; holding, in other words, that the Master should have charged these items against the whole fund, so as to compel such next of kin to bear their proper proportion of such costs and allowance.

In order to a proper understanding of the case, it is

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necessary to refer briefly to the facts which gave rise to the suit, and decree under which the inquiry in the Master's Office proceeded.

Some time in 1876, the said John F. O'Sullivan died intestate in the Province of New Brunswick. The present plaintiff, Denis O'Sullivan, at that time wished to administer to his estate claiming to be his only brother, and sole surviving next of kin, but being in impecunious circumstances was unable to furnish the requisite security, and under these circumstances he applied to the defendant Weldon, and the Hon. J. R. Jones to become sureties for him as administrator, to which they assented on being indemnified by the defendant Harty and one Brown, and on the further condition that he would, as soon as letters of administration were granted to him, have the personal property converted into money, and deposited in the Bank of British North America, to the credit of the defendants: that the defendants were to invest the moneys so handed over to them, and allow Denis O'Sullivan to receive the interest: that upon the final decree of distribution being made, and no other person successfully disputing his right as next of kin, the defendants were to deliver and pay over to him all the moneys, less expenses. And O'Sullivan agreed to make all such inquiries as the defendants might direct, in order to ascertain whether there were any other next of kin.

Letters were granted, and all the securities converted, with the exception of some railway scrip in an English railway, which was handed over to the defendants, but which the plaintiff refused to assist them in converting.

Proceedings were taken in the Westmoreland Court of Probate by the plaintiff, in pursuance of such agreement, to ascertain the next of kin, and to obtain a final decree for the distribution of the estate; and in the course of such inquiry it was ascertained that there were six other persons so entitled, and the accounts of the estate were duly passed, leaving a surplus divisible among them, which entitled each to the sum of \$1,135.11.

This was in the month of July, 1878, and application seems to have been frequently made to Denis O'Sullivan to sign a power of attorney to some one to dispose of the scrip so as to realize upon it, and divide it among the other next of kin, who resided in England; but this he always declined to do, and the defendants were consequently not in a position to settle with them.

In taking the accounts in the Court of Probate, a sum of \$1000 was allowed to the plaintiff for his commission and charges in the management of the estate, and as to this item there is some conflict of evidence.

O'Sullivan says that he claimed \$2,500, for his commission and expenses, and that he did not include in it the claim of Harty. He adds that Mr. Harty then made a claim against him, and he submitted it to the Court, but did not try to get it allowed by the Court, and it was disallowed by the Court. "Mr. Harty loses his \$500," he says was the remark made, and \$1000 was then allowed him for his expenses, \$504 being his commission, and the balance for his expenses.

Several witnesses, on the other hand, who were examined under commission, swear that O'Sullivan, in the Probate Court, stated that in order to get administration bonds, and to get means to go to England to establish his right and that of the other next of kin, he had agreed to give Harty \$500, and these witnesses state that eventually all parties acting for the next of kin agreed to the allowance of the \$1000 upon that representation.

In either view it is difficult to understand why this additional \$500, if allowed at all, should be chargeable against the next of kin. As against them the \$1000 was all that was allowed by the Court of Probate; if these witnesses are to be believed, and I must say that their account appears the most reasonable one; then it is clear it should not be charged a second time against them. If this statement of O'Sullivan is to be believed, then as Harty did all the work which should have been done by the administrator he would be fairly entitled against him, though not against the estate.



This being the state of affairs, O'Sullivan, on the 4th of November, 1880, files his bill against the defendants to compel them not only to pay over to him the \$1000 commission and his proportion of the estate, but to hand over to him the shares, to which by his bill he admits the other next of kin are entitled.

The defendants very naturally answer : We have no confidence in you. By the very terms of your agreement these moneys were to remain in our hands until it was ascertained that no one else but yourself was entitled, in which event we admit we were liable to account and pay over the whole to you, but you have failed to establish that, and have, on the contrary, yourself proved that six other persons are also entitled, and we have at your request become surety that these moneys shall be properly applied. But for your neglect to assist us in converting the railway scrip, we should ere this have paid off their claims.

Upon this a decree is made, not holding the defendants liable for any breach of their duty, but on the contrary allowing them to retain their costs of defence in that suit as between solicitor and client, and making an order upon the plaintiff, to assist the defendants in making sale of the railway scrip, and to execute all such papers as may be necessary.

The decree then contained the following directions: [Here his lordship read the 6th and 7th clauses of the decree above set forth].

This is a suit brought by the plaintiff seeking an account from his own agent, with which the other next of kin have no concern, and by which they could in no way be bound. The plaintiff admits in his own bill that each of these next of kin is entitled to the sum of \$1,135.11, and merely claims that the money should be paid into his hands to be paid over to them.

Upon no principle of justice or fair dealing ought these claims to be diminished, either by the costs of the defence of a suit which was not necessary in their interest, and to which they were not parties. Had they been parties their



costs ought to have been added to those of the defendants. Neither is there any justice in compelling them to pay the compensation to Harty, incurred for services rendered by him to the plaintiff in consequence of his own inability to furnish security.

The whole difficulty appears to have arisen from the unfortunate use of the words "trust estate," in the decree, and the variation in the minutes by striking out the words "to which the plaintiff is entitled." But we must read the pleadings in connection with the decree, and when we find that this is a bill filed for the sole purpose of calling the defendants to account, under their agreement, the words must be confined to the subject matter of the suit, and we must, I think, hold that the Master was correct in holding that these amounts are payable from the plaintiff's share, and that the defendants were authorized in paying to the other next of kin the distributive shares to which they were found entitled by the Westmoreland Court of Probate without any reduction.

I think therefore that the appeal should be allowed with costs, and the order reversing the decision of the Master discharged.

PATTERSON, J. A.—I concur in allowing this appeal, for the reasons given by my brother Burton.

The more I consider the matter, the more obvious it appears to me that the plaintiff's contention is not only opposed to the justice of the case, but that it wants the support of the decree of Vice Chancellor Blake, upon which it is mainly founded.

I do not quarrel with the use of the term trust estate in the decree, for I think those words properly describe the estate which the defendants were managing on behalf of O'Sullivan, who was the trustee, and to whom they are ordered to account for their dealings with it since 1st. May 1878.

That was the date at which the accounts of O'Sullivan had been passed in the Court of Probate, in New Bruns-

wick. Those accounts shewed the gross amount of the estate to be \$10,098.08, which included the English Railway Stock, although it was at that date unsold. O'Sullivan was allowed \$2,151.31, of which \$1,000 was an amount noted as "Commission allowed to administrator, and other reasonable charges and necessary expenses, (by consent.)" The rest of the \$2,152.31, was for disbursements in connection with the administration. The defendant Harty had rendered an account to O'Sullivan, from which it is evident that the greater part, if not all of the money disbursed had passed through Harty's hands. The balance settled by the Probate Court was  $\$10,098.08 - \$2,152.31 = \$7,945.77$ ; and that surplus was ordered to be distributed amongst the seven next of kin, of whom Denis O'Sullivan was one, giving each of them \$1,135.11.

This decree being made on the basis of the accounts of O'Sullivan, in which he was content to be charged with the money value of all the assets, including those not then converted into money, no ground has been shewn upon which he could have gone back to the Probate Court, and asked for a reduction of the distributive shares, because he had to employ and pay another for doing what an administrator in better circumstances would himself have done.

The sixth section of the decree orders the defendants within a limited time to settle the claims of the next of kin other than the plaintiff, and section 7 orders that if upon that being done, any balance of the estate, after deducting the costs by the decree given to the defendants, and their allowances, remain in their hands, they shall pay it to the plaintiff.

Now if, as the plaintiff contends, the costs and allowances were in the first place to be deducted, and the residue distributed among the seven next of kin, this seventh clause would have been very differently expressed. I do not read the sixth clause as forbidding a settlement with the others until after these accounts should be taken, but as providing against the defendants keeping the matter unsettled for an unnecessary length of time, giving the plaintiff the benefit

of any abatement which the others might agree to make in their claims, which seems to have been thought possible while the railway shares were unsold, and the accounts to any extent open, but which no one would have expected to happen after every thing was closed.

The other point urged respecting the striking out from the fourth section of the minutes of the decree the words, "to which the plaintiff is entitled," thus giving the defendants their costs out of any moneys in their hands, whether moneys to which the plaintiff would, as between himself and his *cestuis que trustent*, be ultimately entitled or not, seems to me to tell as much in the defendants' favour as against them.

On the whole I am of opinion that the present contention of the defendants is not inconsistent with the decree, but is supported by it, and as my brother Burton has pointed out, the defendants in paying over to the next of kin the amounts awarded to them by the decree of the Probate Court have not only done what the plaintiff was bound by that decree to do, but have done what the plaintiff by his bill in this action avers his desire to.

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## REGAN ET AL V. WATERS.

*Surrogate Court—Mental capacity.*

On the trial of an issue, directed by the Surrogate Judge, before a jury, evidence was given as to the mental capacity of the testator by persons acquainted with him, the grant of probate being opposed by the widow on the ground, amongst others, of mental incapacity. The Judge at the trial being of opinion that the witnesses examined were not of a class qualified to give scientific evidence as experts, withdrew the case from the jury, and gave judgment in favour of the plaintiffs, granting probate of the will, which he afterwards refused to set aside.

On appeal, a new trial was directed, and the costs of appeal ordered to be paid by the plaintiffs, it being held that the case should have gone to the jury, and that the opinions of such witnesses were clearly admissible being of more or less value according to their skill, or experience or aptitude for judging of such matters, all which tests would be applied by the jury.

THE Surrogate Court of the county of Kent, having ordered the issues herein to be tried by a jury, at the sittings of the County Court of the said county in the June Session for 1883, the said issues were so brought on for trial, but the learned Judge held that there was not any sufficient evidence to go to the jury, and withdrew the issues from them and entered a verdict for the plaintiffs, and so certified the record to the Surrogate Court. This was an appeal from the judgment of the same Court, whereby a rule *nisi* to set aside the verdict for the plaintiffs was refused.

The appeal came on to be argued before this Court on the 29th of May, 1884.\*

The other facts giving rise to the appeal are stated in the judgment.

*McCarthy*, Q. C., for appellant.

To entitle the plaintiffs to succeed they must prove to the satisfaction of the jury (besides the proper execution of the alleged will) the fact, as alleged in the declaration, that the testator was of sound mind, memory, and understanding at the time of making the alleged will, and the jury must find that fact; *Sutton v. Sadler*, 5 W. R. 880 ;

*Present.*—HAGARTY, C.J.O.; BURTON, PATTERSON, and MORRISON, JJ. A.

*S. C.*, 3 C. B. N. S. 87 ; *Symes v. Green*. 1 Sw. 401 ; *Cleare v. Cleare*, 1 P. & D. 655 ; *Theobald* on Wills, ed. 1881, p. 14. The trial of the issues having been begun (as directed) with a jury, the learned Judge who presided should not have withdrawn them from the jury and entered a verdict for the plaintiffs: *Denmark v. McConaghy et al.*, 29 C. P. 563

Admitting that the learned Judge was right in ruling that the onus was upon the defendant to prove unsoundness of mind, still there was sufficient evidence to go to the jury upon which the jury might have properly found the issues or some of them in favour of the defendant, and the learned Judge should have allowed the jury to find a verdict thereon: *Giblin v. McMullen*, L. R. 2 P. C. 317 ; *Ryder v. Wombwell*, L. R. 4 Ex. 32. In any event the onus of proving some of the issues was upon the plaintiffs, and the jury should have been allowed to give their verdict on those issues.

*R. M. Meredith*, for the respondents, contended that having proved the due execution of the will, which contains a proper attestation clause, the respondents had made a *primâ facie* case, and the onus then lay upon the appellant to remove the presumption of the competency of the testator by evidence of his incompetency, and the learned Judge at the trial was right in so holding. The testator is to be presumed to be sane until the contrary is proved, and the onus of proving incapacity or insanity is upon the party impeaching the will on that ground. Here the evidence given by the witnesses for the appellant strengthened the case of the respondents, and the learned Judge properly held that there was no evidence given upon which the jury could reasonably find a verdict for the appellant: *Swinfen v. Swinfen*, 27 Beav. 148 ; *Martin v. Martin*, 12 Grant 500 ; *McNaghten's Case*, 10 Cl. & F. 200 ; *Wms.* on Exrs., 8th ed., p. 20 ; *Taylor* on Ev., 7th ed., p. 338, and cases therein referred to ; *Walkem* on Wills, pp. 66 to 73, and cases therein referred to ; *Bell v. Lee*, 28 Grant 150, and in appeal, 8 A. R. 185 ; *Cheese v. Lovejoy*, 2 Pr. D. 161.



June 30, 1884. PATTERSON, J. A.—This is an appeal from a decision of the Judge of the County Court of the County of Kent, sitting as Judge of the Surrogate Court, refusing a rule for a new trial.

James Waters died on the 8th September, 1882, leaving a will by which he bequeathed to his two sisters, Margaret and Catherine, \$100 each; to his father, \$100; to his brother Michael, \$100; to Thomas Coleman, \$50; to his executors, \$100 to be expended in masses, and to all his nephews and nieces, \$25 each. He directed his executors to purchase a monument for his grave; authorized them to pay his debts, and also a balance due on a lot of lard purchased in the name of his son Frederick; and sell his other real property, which he described; and out of the proceeds to pay the legacies, and divide the balance among his three children, Frederick, William, and Ellen, directing that until such time as a reasonable sale could be effected the rents should be expended in improvements on the properties, which consisted of a farm and a hotel; and he further directed that if his father died before the legacies were paid the amount bequeathed to him should be expended by the executors for his benefit, by which he probably meant in paying for masses.

One person whose name is omitted from the will, is the wife of the testator, who is the present defendant.

The defendant entered a caveat against granting probate of the will, alleging as grounds

(1) That it was not duly executed:

(2) That the testator was not of mind and memory sufficiently sound to know and understand the nature and effect of the will, and to make a proper disposal of his estate:

(3) That the will was procured to be made by undue influence:

(4) That the testator was, through false and fraudulent representations of parties who are named as legatees, deluded into believing that the defendant was unfaithful to him, and that their children were illegitimate.

The plaintiffs are the executors named in the will, and propounded the will in the Surrogate Court, the defendant pleading the same matters set out in her caveat, with slight expansions.

The learned Judge directed the issues between the parties to be tried by a jury, in pursuance of the 18th section of the Surrogate Courts Act, R. S. O., c. 46, which enacts that the several Surrogate Courts may cause any question of fact arising in any proceeding under the Act to be tried by a jury before the Judge of the Court; and upon order being made allowing a trial by jury, such trial shall take place at some ensuing sittings of the County Court for the county, and be conducted in the same manner as other trials by jury in the County Courts; and the parties shall be entitled to their right of challenge, and for all purposes of or auxiliary to the trial of questions of fact by a jury before a Judge of the Surrogate Court, and in respect of new trials, the Surrogate Courts and the Judges thereof shall have the same jurisdiction power and authority in all respects as belong to the County Court and the Judge thereof for like purposes.

Section 27 provides that the rules of evidence observed in the Superior Courts of Law shall be applicable to, and observed in, the trial of all questions of fact in the Surrogate Courts.

At the trial, and after the close of the evidence, the learned Judge ruled, in effect, that there was no proper evidence for the jury in support of the defendant's pleas, and directed a verdict for the plaintiffs.

This appeal is from his refusal of a rule to disturb that verdict.

It is brought under section 31 of the Surrogate Act, which permits an appeal from an order, sentence, judgment, decree or determination of a Surrogate Court or Judge, but limits that right to cases in which the value of the goods, chattels, rights, or credits to be affected by such order, sentence, decree or determination exceeds \$200.

Mr. Meredith raised an objection to our jurisdiction, on

the ground that the personal estate appeared from something said in the evidence to consist only of a mortgage for \$100. We declined to entertain the objection, as a preliminary objection, raised only when the appeal came on for argument, as it ought to have been raised either in the Court below, as a reason for refusing to allow the security, or to certify the proceedings to this Court; or at latest by way of motion in Chambers to strike out the appeal. Besides this, we had not the means of saying as a fact, that there was not a large enough amount at stake to confer the right of appeal.

Looking over the papers returned by the Judge, but which our orders do not require to be printed, I observe that the question of the amount was brought before the Judge, who doubtless satisfied himself that the case was appealable.

I may here note also that there seems to have been an attempt on the part of the plaintiffs to have the facts tried by a Judge without a jury. At least I find a notice of an application for that purpose.

The Judge was clearly right in ruling that there was no evidence whatever on the allegations of undue influence, or of the existence of the alleged delusions.

But it is not so clear that there was not evidence proper to be submitted to them on the subject of the testator's testamentary capacity at the time the will was made. My opinion is, that the evidence ought to have gone to the jury, and that there ought to be a new trial granted. That being so, it would be improper to give any opinion as to the weight which, as the evidence strikes one from merely reading the reporter's notes, ought to be attached to it. I am also unable to see good reason for rejecting the opinions of persons who were in communication with the testator at the time, or about the time, the will was made, as to the state of his mind. Their opinions may be of more or less value according to their skill, or experience, or aptitude for judging of such matters, all which tests will be applied by the jury; and mere opinions unsup-

ported by facts justifying them would properly be rejected altogether without reference to the witness being called an expert or not professing to speak in that somewhat indefinite character. But it must be proper to allow the evidence of any witness who has had an opportunity of observing the patient to be introduced by asking what the witness, from his observation, thought of the patient's capacity, letting the value of the opinion be tested by cross-examination.

I have had some hesitation about interfering with this judgment, notwithstanding the view I have now explained of the evidence. That arose from my having looked upon the order for trial by the jury as of the nature of the directing of an issue for the information of the conscience of the Court; and I thought that the Judge might be understood to have merely withdrawn the issue, reserving to himself the decision of the question, somewhat on the principle on which the Court of Chancery has sometimes disregarded the finding of a jury, or, where the finding has not covered all the ground, proceeded without further reference to it. Instances of this are given in *Daniell's Practice* at pp. 742-3 of the 5th edition.

But a further reading of the statute has satisfied me that this is not like sending down an issue; but is analogous to the practice in the other Courts of trying issues of fact with or without a jury, as the Judge may decide. The general rule is, to try by the Court itself, but an order may be made to try by jury. That order may, of course, like any other be rescinded or varied; but while it stands the ordinary rules of practice govern the proceedings under it.

I am, therefore, of opinion that we should allow the appeal, with costs; and direct a rule absolute to issue for a new trial in the Court below.

HAGARTY, C. J. O.—I am of opinion that the motion for a new trial ought not to have been refused. When the learned Judge decided to exercise the power given by the statute

to call in the assistance of a jury to try the very important questions of fact, as to the execution of the will, and the capacity of the testator, the case should have been tried in the manner usual and proper for such a trial. I differ from the view expressed that there was no evidence to be submitted to the jury, and had the jury found therein against the will, I for my part also do not think that there was anything before us to shew their verdict should have been disturbed. This remark does not apply to the mere matter of execution.

I also notice that at respondent's instance evidence was rejected of persons as to their opinion of the testator's mental state and capacity on the apparent ground of such evidence being that of non-professional persons. We know of no such rule of exclusion. The weight to be attached to such evidence is a wholly different matter. Any person may be asked what opinion he had formed as to a person's capacity to dispose of his property at any time about which the alleged will was made, or before or after. In many cases no professional opinion can or has been obtained. The law, we think, knows no such ground for exclusion of testimony. The evidence of the person who drew the will reads most unsatisfactorily.

I think the appeal should be allowed, with costs, and a new trial awarded.

MORRISON, J. A., concurred.

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## MACDONALD V. CROMBIE ET AL.

*Fraudulent preference—Facilitating the recovery of judgment—Signing admission of stated account.*

M. being in insolvent circumstances, gave to one of his creditors a memorandum shewing a stated account as then due of "\$32,155.38 cash at this date." This amount was arrived at by allowing the usual trade discount between the parties upon claims which were not then actually due. The creditor was at the time aware of M.'s insolvency. On the day following, the creditor sued out a writ of summons against M. specially indorsed under order 3, rule 4, for above amount, and in due course recovered judgment for default of appearance. The creditor then issued execution immediately, and placed the same in the hands of the sheriff. The plaintiff began proceedings for an overdue debt against M. after the commencement of the above suit, and recovered judgment under rule 324, and placed his writ in the hands of the sheriff six days after the execution of the defendants above referred to.

The defendants subsequently purchased the goods under these and other executions.

*Held*, affirming the judgment of the Queen's Bench Division, 2 O. R. 243, that the facility thus afforded on the part of M. did not constitute a fraudulent preference within the meaning of R. S. O. cap. 118.

*Young v. Christie*, 7 Gr. 812, and cases following it, approved and followed.

THIS was an appeal from the Queen's Bench Division, as reported in 2 O. R. 243, where the facts and circumstances giving rise to the action are fully stated.

The reasons for appeal assigned by the plaintiff were that it appeared from the finding of the learned Judge before whom the case was tried, that the judgment debtor Morrison, in effect, though not in form, gave to the judgment creditor a confession of judgment under circumstances which would render the judgment void under R. S. O. cap. 118, sec. 1, had a confession of judgment in form been given. The appellant submitted that the Act in question, having for its object the equal distribution of estates of insolvent debtors, and the prevention of fraudulent preference of creditors, should receive a liberal construction, and that when the creditor, by the active assistance of the debtor, obtains a judgment, such judgment comes within the provisions of the first section of the said Act. It appears from the findings of the learned Judge, that the debtor and creditor, then being subject to the provisions of the said Act, entered

into an agreement for the transfer of the stock in trade of the debtor to the creditor; but for the purpose of evading the provisions of the 2nd section of said Act, it was arranged that said transfer should, as a matter of form, be carried into effect by means of a judgment, execution, and sale by the sheriff under execution. The appellant submitted that what was done was a conveyance, transfer, or assignment, within the meaning of the 2nd section of said Act: *Sharp v. Thomas*, 6 Bing. 416; *Doe v. Carter*, 8 T. R., 302; *Young v. Billiter*, 6 E. & B. 1, 8 H. L. 682; *Croft v. Lumley*, 6 H. L. 672.

In support of the judgment appealed from, the defendant assigned the following reasons:—"1. The judgment recovered by the respondents against Gideon Morrison is not impeachable under R. S. O. cap. 118, sec. 1. It was not founded on a confession of judgment, warrant of attorney, or *cognovit actionem*. 2. What Morrison did was not even in effect a confession of judgment. It did not enable the respondents to recover judgment sooner than they could have done without it, nor to dispense with any proceedings which would otherwise have been necessary. 3. The judgment and execution of the respondents against Morrison, the sale of the goods by the sheriff, and purchase thereof by the respondents, are not, nor is any of them, impeachable under R. S. O. cap. 118, sec. 2. They do not constitute an assignment or transfer by the debtor within the meaning of that section. 4. There was no evidence of any agreement between Morrison and the respondents for the purchase of the goods by the respondents; but the contrary was proved. Such an agreement would have been impossible of performance, as the sale was by the sheriff to the highest bidder. 5. The appellant cannot attack the respondents' proceedings as constituting a transfer of property without attacking the sheriff's sale and the purchase by the respondents thereat, which are essential ingredients of such transfer. But they do not attack such sale and purchase, and on the contrary they seek to ratify and confirm the same, and have their claim paid out of the

proceeds thereof. 6. The appellants are not in a position to impeach the sheriff's sale, which was had in obedience to their own execution and to five prior executions which are not attacked ; nor can the purchase by the respondents be complained of, as they were the highest bidders. 7. But for the high bid made by the respondents at the sale, the proceeds would only have been sufficient to pay off executions prior to that of the appellants, and admittedly valid ; and the appellants cannot contend that the transfer is void, and at the same time seek to take the benefit of it for the payment of their claim. 8. The Act R.S.O. cap. 118, being in derogation of the Common Law rights of creditors, should be construed strictly."

*J. H. Macdonald*, for the appellant.

*D. E. Thomson*, for the respondents.

March 22, 1884. PATTERSON, J. A., delivered the judgment of the Court.

No good reason has been shewn why we should disturb the judgment appealed from. The reasons given for their decision by the Chief Justice of the Queen's Bench, and Mr. Justice Cameron, in the Divisional Court, so fully cover the ground that I shall venture to add only a few words to what they have said.

It was not contended before us that the defendants' judgment against Morrison could be successfully impeached under the first section of the statute R. S. O. ch. 118. The effort was to bring the facts within the effect of the second section, as amounting to a transfer of the stock in trade from the debtor to his creditor with intent to give him a preference over the other creditors.

If the defendants, in place of themselves buying the goods, or some of them, at the sheriff's sale, had simply sold them out and pocketed the money in payment of their judgment, we should have had the precise case which has been dealt with in many of the decisions from *Young v. Christie*, 7 Gr. 812, downwards. I think those cases were properly decided.

When, in passing the Act 22 Vict. ch. 96, the Legislature did not in terms declare that a judgment should be void by which a preference was obtained, but dealt merely with the particular instruments or acts known as confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, it was legislating in view of a procedure which was essentially the same as that which now exists.

The Act was passed in 1858, two years after the passing of the Common Law Procedure Act, under which final judgment was authorized in default of appearance to a specially indorsed writ. To have extended the effect of the statute beyond the limits so definitely prescribed would have been legislation rather than interpretation, and the decisions which proceeded upon that view do not strike me as fairly open to the charge of putting too narrow a construction upon the language of the Legislature.

The attempt now made to bring the transaction under a different rule, because the judgment creditors were themselves the purchasers of the goods, or some of them, would require the language which forbids a gift, conveyance, assignment, or transfer to receive a strained construction, as was pointed out in the Court below; but, apart from this, a more careful reading of the second section makes the distinction we are now asked to recognize impossible. The Act does not deal with transfers, &c., from the debtor to the creditor only. All transfers made in the described circumstances, and with the forbidden intent, are declared void whether the transferee is a creditor or a stranger. This is manifest from the direct enactment, and it is confirmed by the exception of *bonâ fide* sales of goods in the ordinary course of trade or calling to innocent purchasers.

Therefore we could not apply a rule such as we are now asked to adopt to the circumstances of this case, without being prepared to apply the same rule in a case where the creditor was not himself the purchaser; in other words,

without being prepared to overrule the series of cases beginning with *Young v. Christie*.

*Appeal dismissed, with costs.*

[This case has been taken to the Supreme Court.]

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McEWAN v. McLEOD.

*Practice—Interest on judgment.*

Where an appeal is brought against a judgment in any personal action which is affirmed on appeal, interest on the judgment is by force of the statutes allowed for such time as execution has been stayed by the appeal; but where the plaintiff refrained from entering up his judgment until after the decision in appeal, this Court refused to order interest to be allowed on the amount of the verdict; leaving the plaintiff to apply to the Court below for relief by entering the judgment *nunc pro tunc*.

IN this case the defendant had appealed from a judgment pronounced against him by the Queen's Bench, and which judgment was affirmed by this Court, 8 A. R. 239. When the appeal was instituted, the plaintiff in the action refrained from entering up judgment, and took no further proceedings until after the delivery of judgment by this Court, when he sued out the usual certificate of dismissal of the appeal, with costs.

On carrying this certificate into the office of the Registrar of the Queen's Bench for the entry of judgment, that officer declined to allow plaintiff interest on the amount of his award during the delay occasioned by the appeal. Thereupon *Aylesworth*, on the 23rd of May, 1884, on behalf of the plaintiff, moved upon notice for an order that the Registrar of this Court should include in his certificate of the dismissal of the appeal an order to allow such interest. He relied upon the provisions of the Court of Appeal Act, R. S. O. c. 38, sec. 43.



*Holman*, contra, objected to any order being made, as the plaintiff, by his own delay in entering judgment, had deprived himself of the right to recover the interest claimed against the defendant; and if plaintiff were entitled to any relief at all, his proper course was to apply to the Court below.

May 28, 1884. BURTON, J. A., delivered the judgment of the Court.

In this case the appeal to this Court was dismissed on the 22nd January, 1884. An application is now made for an order upon the registrar to embody in his certificate an order or declaration of this Court that the respondent is entitled to, and is to be allowed interest for such time as execution has been delayed by the appeal.

It appears to us that no such declaration is necessary, and that the order ought to be refused.

No interest was payable upon judgments at common law, but by the 3 Henry VII., c. 10, costs and damages were allowed to the party whose execution was delayed at the discretion of the justice before whom the writ of error was sued, under which it was the practice to allow interest on the judgment between the time of signing judgment and affirming it.

In England, by the 1 & 2 Vict. c. 110, it was provided that every judgment should carry interest at the rate of 4 per cent. from the time of entering up judgment.

Our own legislation was in advance of that of England in this respect, for so far back as 1822 a successful litigant was entitled to charge interest upon the amount recovered from the time of entering his judgment.

In 1837, provision was made that the Court of Error and Appeal should, in the event of judgment being given for the defendant in error, allow interest for such time as execution had been delayed by a writ of error or appeal. It is not easy to understand why this provision should have been made, inasmuch as on the affirmance of the judgment and the remission of the transcript of the judgment

to the Court below, that Court was in a position to award execution not only for the amount of the sum recovered by the judgment, but for interest from the date of entry, and costs of the Court below and of those in the Court of Error and Appeal.

It would almost appear as if the draughtsman had overlooked the provisions of the Act of 1822.

When the writ of error was abolished by the 20 Vict. ch. 5, and the proceeding to appeal made a step in the cause, the language of the section was somewhat altered, but that adopted cannot be said to be remarkable for its accuracy of expression, the respondent being still described as the defendant in error. Both in that Act however and in the present enactment, the word "Court" is substituted for the Court of Error and Appeal, and the section now reads: "That when on an appeal against a judgment in any action personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the Court for such time as execution has been delayed by the appeal."

In view of the change effected by the Act of 1822, so that all judgments now carry interest from their entry, the fact that the appeal is only a step in the cause, and that on the dismissal of the appeal the judgment in the Court below stands affirmed, no order is necessary, but the judgment carries interest by force of the statute. If the respondent has failed to enter judgment as he might have done, he may experience some difficulty in enforcing the claim for interest, but if any relief can be obtained by giving effect to it as a judgment of an earlier date, that relief must be sought for in the Court below.

The provision in the statute seems inapplicable to the state of things now existing, where a plaintiff whose judgment is affirmed is entitled as of right to interest from the original entry of the judgment.

We are of opinion that the motion is misconceived, and should be refused, but without costs.

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## TRINITY COLLEGE V. HILL.

*Mortgage—Absent defendant—Service.*

Proceedings were instituted, in 1876, against two persons interested in a mortgage estate, one of whom was resident out of the jurisdiction, and the usual decree and account was made and taken. The application to make such decree absolute was not made until May, 1882, and in the early part of the month following a petition was presented praying that the defendants might be allowed to redeem, alleging the ignorance of the absent defendant of the proceedings until his return to the country, a few days before signing the petition, and the ignorance of both defendants of any proceedings subsequent to the filing of the bill; and that the defendant upon whom the bill was served was about ninety years old, and of feeble intellect, unfitted to transact business.

It was shewn that in March, 1882, before the order making the decree absolute, the plaintiffs had sold to one Grattan, who bought, relying on the plaintiffs' title under the final order of foreclosure, which, on its face, was expressed to be subject to the General Orders of Chancery 114-5-6.

Under the circumstances the Court (reversing the order of Boyd, C.,) made an order to open the foreclosure on the usual terms of paying principal, interest, and costs of plaintiffs, and of the purchaser (not including any costs of the appeal, of which each party should bear their own), together with any costs incurred by the purchaser in connection with his purchase of the property, and in default of payment on or before the day appointed for payment the appeal to be dismissed, with costs.

THIS was an appeal by the defendants from the judgment of Boyd, C., reported 2 O. R. 348, where and in the present judgment the facts are fully stated.

The reasons of appeal alleged, amongst other things, that James Hill had not been personally served with the bill of complaint, the decree, or the papers in the action, and had not any knowledge or notice of the proceedings to foreclose; nor was he aware that the decree and final order of foreclosure had been made until shortly before filing the petition by the defendants, so that the effect of the several orders made was, to deprive the defendant James Hill of his property without his having had an opportunity of redeeming.

That the evidence established clearly that the plaintiffs were aware of the residence of James Hill, and that there was not in reality any difficulty in serving him with the bill and the other papers in the cause as required by the General Orders of the Court of Chancery; and the other

defendant John Hill, was shewn to have been so old and infirm that he was unable to understand or appreciate the nature or effect of the papers that were served upon him. Had these facts been disclosed to the Court on the hearing of the cause the decree and subsequent orders would not have been pronounced.

The evidence also established that Grattan, when he bought from the College, had knowledge of the possession of the premises by John Hill, so that he acquired only such interest as the vendors had, which was that of mortgagees only, the decree not being absolute against the defendants, and the right to redeem being still open.

That the order making the decree absolute was obtained by the plaintiffs after they had conveyed to Grattan, and therefore the rights of the defendants continued as they were before that time; in fact that the relationship of mortgagors and mortgagee still continued to exist as between the defendants and Grattan.

On the part of the college it was contended that the evidence established that every effort had been made to serve James Hill, and failing to find him an order for substitutional service as to him was made. This Court will not now review that order. Under the circumstances, it was for the Judge, when granting such order, to decide as to the propriety of that proceeding; and it is not a violent assumption to make that James Hill was kept fully informed of the several proceedings by his co-defendant during the progress of the action; and that even if the decree of foreclosure was not absolute, the defendants had not shewn such a case as would entitle them to relief against it, and to be let in to answer the bill of complaint.

Grattan, in opposing the appeal, contended that the effect of the final order of foreclosure was to vest absolutely the ownership of the lands in the college, and that he purchased from the college for value without notice of the claim of the defendants. And in any event he, as purchaser, could not be affected by any irregularity in the service of the several proceedings and pleadings on

the defendants prior to the final order; and by the sale of the lands to him the college had completely altered their relation to the lands, and the defendants could not any longer claim a right to redeem, no additional right in that respect being intended to be created by the general orders of the Court of Chancery 114-5-6.

The appeal came on to be argued on the 7th of February, 1884.\*

*Bain*, Q. C., for the Hills.

*VanKoughnet*, Q. C., for Trinity College.

*Hoyles*, for the purchaser Grattan.

The cases cited appear in the report of the case in the Court below.

June 8th, 1884. PATTERSON, J.A.—The plaintiffs filed their bill in June 1876, against John Hill and James Hill, to foreclose a mortgage made by the defendants to the plaintiffs in 1862, alleging that the time for payment had elapsed and that no sum had been paid for principal or interest.

The plaintiffs had not had possession of the land, which is a farm lot of 200 acres in the township of Alfred, in the county of Prescott.

The defendant John Hill, who is an old man said to be nearly ninety, was joint-owner of the lot with his son James, the other defendant, and has continued to live on it. James lived there also till 1870, when he went to the State of Michigan.

The bill was served on John Hill on 20th September, 1876, upon the premises, by the deputy sheriff of the county, who shews by his affidavit that either on the day he served John Hill or a few days after that he met, at the house, a daughter of John Hill, whom he describes as a remarkably intelligent young woman, and urged the importance of steps being taken to raise money to pay off

*Present.*—SPRAGGE, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.



the mortgage, offering to aid them in procuring a loan from a company for which he acted as agent ; and he frequently spoke to her and her father on the same subject. He inquired from her the address of her brother James, which she at first refused to give, but afterwards, when the proposed loan was being spoken of, she produced a letter from James, dated at Traverse City, Michigan. Thereupon he had a power of attorney prepared by a solicitor and sent by mail to James, at Traverse City, and he received it back duly executed.

The loan does not appear to have been effected.

The solicitor for the plaintiffs shews by his affidavits that the utmost diligence was used to bring the proceedings to the knowledge of James Hill. He promptly, after serving John Hill, sent an office copy of the bill for service on James, to the sheriff of the county where Traverse City is, but it was returned to him with statements of ineffectual efforts to find James either at Traverse City, or at Manistee, to which place he was said to have moved.

Then on 11th May, 1877, he took out an order for substitutional service on John Hill, which was to be deemed good service on James; the order further directing an office copy of the bill to be addressed to James and mailed in a prepaid registered letter to him at Traverse City and Manistee respectively, all of which directions were complied with on 14th May, 1877. And lastly there was mailed to James on 14th August, 1877, in a prepaid registered letter addressed to him at both the places in Michigan, a copy of another order made on the 14th of August, allowing as good service the service of an office copy of the bill upon him, although effected after the time limited in that behalf had expired; giving him four weeks further time from the service of that order in which to answer or demur to the bill; directing service of the order by mailing it as was done; and declaring such mailing of it to be good service.

The bill was noted *pro confesso*. It did not appear as a matter of fact that the proceedings had come to the know-

ledge of the defendant James. I do not gather from anything before us that any inquiry was made through the post office as to the fate of the letters, &c., which the orders had required to be registered, and which are shewn by the affidavits to have been registered.

A decree was made, after taking the account, on 14th November, 1877, and a final order of foreclosure on 14th June, 1878.

The final order is expressed to be subject to General Orders 114, 115, and 116. These are three of the General Orders on the subject of taking bills *pro confesso* which were in force in 1877 and 1878. Under them a decree, obtained as this decree against James Hill was obtained, did not become absolute without some further action. One provision of order 116 was, that the Court might order it to be made absolute on the motion of the plaintiff, after the expiration of three years from the date of the decree, where the defendant had not been served with a copy of it. Until that was done the defendant was permitted, by Order 117, if he had a case upon the merits, not appearing in the bill, to apply to the Court by petition, stating such case and submitting to such terms with respect to costs and otherwise as the Court should think reasonable, for leave to answer the bill; and the Court, on being satisfied that the case was proper to be submitted to the judgment of the Court, was then, if it thought fit, and upon such terms as should seem just, to vacate the enrolment (if any) of the decree and permit the defendant to answer the bill.

An order was obtained on the part of the plaintiffs on 1st May, 1882, making the decree and final order absolute.

Up to that time nothing had been done on the part of the defendants.

Their first action was the presentation of the petition upon which the present contest has arisen.

It was presented in the beginning of June, 1882, in consequence, as it would seem, of steps instituted on the part of the plaintiffs for obtaining possession of the land.

It is by both defendants. It states the mortgage and

the foreclosure proceedings, of which it alleges the defendants had only lately been informed. It mentions the continued residence of John Hill upon the land, and the absence of James in the United States; alleges that the deputy sheriff did not serve any paper on John Hill or leave any paper with him, but offered to procure a loan for him and took away with him, for the purpose of procuring the loan, the papers he had produced at the house; and denies any knowledge by James of the proceedings until his return to this country a few days before the signing of the petition, and any notice to either defendant of any proceedings subsequent to the filing of the bill. It further states that John Hill is old and infirm, being nearly ninety, and that he was when the deputy sheriff came with the papers, and had been for some years before that, of weak and feeble intellect, unfitted to transact business, and incapable of reading or understanding the meaning of any law papers which might have been handed to him, but that none such were in fact handed or served. The defendants submit to pay whatever is due on the mortgage, alleging their ability to do so, but claiming credit for some payments to a gentleman who acted, as they say, as agent for the plaintiffs; and they add that they have lately learned that the plaintiffs have offered to sell the lands to one Grattan, but they charge that the purchase is not concluded, and that Grattan was aware of all the alleged facts before he entered into negotiations for the purchase. Their prayer is, that the foreclosure proceedings may be re-opened, and that they may be allowed to redeem, a fresh account be taken, &c.

The learned Chancellor dismissed the petition, and the defendants appeal from his decision.

The petitioners urge their prayer upon the ground of their right under the facts, which I have stated without touching all the details embodied in the materials before us, and they also appeal to the discretion which in a proper case the Court will exercise in opening a foreclosure.

The transaction between the plaintiffs and Grattan requires to be understood, because both parties rely to some

extent upon it. The plaintiffs and Grattan say that the plaintiffs did by their sale to Grattan elect to deal with the land as theirs absolutely, and no longer as security for the debt; and they urge this as concluding the question of the power of the defendants to re-open the foreclosure. To this the defendants reply that the sale to Grattan, if a completed sale, was made before May, 1882, and so disabled the plaintiffs from obtaining a valid order making the decree absolute as they assumed to do on the 1st day of May; and that Grattan took with notice of the exact state of the title.

The facts, as I gather them from the affidavits of Mr. Grattan and Mr. Atkinson, are, that about the end of 1881, Grattan made proposals to buy the lot; that in March, 1882, the solicitor for the plaintiffs wrote him, offering to take \$1,500, of which \$500 were to be paid in cash, and the rest in five years, and explaining that the title was by a mortgage from the Hills which had been foreclosed: that in reply to an inquiry from Grattan, who is an illiterate French Canadian, and who does not speak English, the solicitor sent him by mail the final order of June, 1878, which satisfied him that the plaintiffs could convey the land; whereupon in the same month of March he sent \$500, together with a mortgage for \$1,000 duly executed, to the plaintiffs, who executed a conveyance to Grattan, retaining the deed along with the mortgage.

It is thus clear that the transaction was complete before the order absolute of 1st May, 1882, was applied for; and that Grattan purchased in reliance only upon the final order of June, 1878, which, upon its face, was made subject to the General Orders, 114, 115, and 116.

It would seem from the judgment of the learned Chancellor, that his attention cannot have been called to the dates to which I have just referred, because he treats the sale to Grattan, if I correctly understand his remarks, as having been later than the order absolute; whereas the evidence makes it clear that it was a month or two earlier. The consequence of this difference in our apprehension of



one of the material facts of the case is, that we look at the matter from different points of view ; and that we may therefore quite agree as to the principles which should guide us, without arriving at the same conclusion.

The circumstances seem to me essentially like those in the case of *Campbell v. Holyland*, 7 Ch. D. 166, on which Mr. Bain relied in his argument before us. The subject of the mortgage in that case was, the reversionary interest in a fund. Campbell, the mortgagee, sold his interest to Ford on the 3rd day of January, 1877. The mortgage money was payable, under the decree in the foreclosure action, on the next day, viz. 4th January. Mayhew and Graham, the purchasers from Holyland of the equity of redemption, purposely avoided paying the money on that day, because they supposed they had bought also Campbell's interest as mortgagee ; and then finding that Campbell had sold to Ford, they consumed over six months in an attempt to compel Campbell to specifically perform the agreement to sell to them, their action being dismissed on 25th July, on the ground that Ford had the better title, and because they failed to prove a contract binding upon Campbell. In the meantime Campbell had, at the instance of Ford, procured an order upon an *ex parte* application, making the foreclosure decree absolute. It was not until late in November that Mayhew, and the executor of Graham who had died, brought on their motion to re-open the decree. They had on 12th of November made Ford a tender of the mortgage money and costs, but he had declined to make any ren-  
gnment.

Sir George Jessel, M. R., gives in his judgment a very full and very lucid exposition of the principles which govern Courts of equity in granting relief, such as is asked for on this petition. But, instead of quoting it at any length, I shall read the statement of the same doctrine by the late Chancellor VanKoughnet, in *Platt v. Ashbridge*, 12 Gr. 105, which is much shorter and at the same time very comprehensive : " As is said in *Thornhill v. Manning*, (1 Sim. N. S. 453,) the relations of mortgagor and mortgagee in this



Court are anomalous. This Court looks at the estate from first to last as only a pledge for the debt. The mere fact of an order absolute for foreclosure being obtained does not necessarily prevent the Court from rescuing the estate from the mortgagee. Indeed the order absolute amounts to little more than authority by the Court to the mortgagee to deal with the property as his own. When he in any way as such owner alters his relation to it, he adopts it as his own and foregoes his debt, and neither he nor the mortgagor can afterwards treat it as a mere pledge for the debt, and insist that the latter is subsisting. Until this is done, the mortgagee is in no way bound to take the property for his debt, notwithstanding the order for foreclosure. He may treat this as a nullity and sue at law for his mortgage money. Can he, therefore, insist that it is final as against the mortgagor, when there has been no change otherwise in their relations, no change in the property or in the use of it? It is a matter of discretion to grant indulgence to a mortgagor, and though my brother Mowat has taken a very lenient view of his case here; yet, for the reasons stated by him, I am not disposed to disturb it."

This language applies very aptly to the present case, if we regard the parties simply as mortgagor and mortgagee, that is to say, leaving Grattan out of view. The mortgagor has remained undisturbed in possession of the land until the recent movement towards evicting him, which was promptly met by the petition now before us.

Then how does the incident of Grattan's purchase affect the position? The Master of the Rolls deals with the case of a purchaser, and as he speaks of one who purchases after order absolute, his remarks apply with greater force to a case like the present, Grattan having, like Ford in *Campbell v. Holyland*, bought before the absolute order and with actual notice of the title he was buying. "Therefore," the M. R. said, at p. 172, "every body who took an order for foreclosure absolute knew that there was still a discretion in the Court to allow the mortgagor to redeem. Under what circumstances that discretion should be exercised

is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it ; but he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, and everybody buying the estate from a mortgagee who merely acquired a title under such order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion, by the Court of Equity which had made the order."

These observations may, as remarked by the learned Chancellor in the judgment now in review, have been unnecessary for the decision of the case of *Campbell v. Holyland*, inasmuch as Ford's purchase was before the order. The same thing may be said of the dictum of VanKoughnet, C., as to the effect of an alteration by the mortgagee of his relation to the property, no such fact being in question in *Platt v. Ashbridge*. I agree with the learned Chancellor that the circumstances of the country, and our way of dealing with lands, require a rule not quite so elastic as might be deduced from the passage I have just quoted from the judgment of Sir George Jessel. At the same time I do not understand VanKoughnet, C., to have intended to lay down a rule so rigid as altogether to exclude the discretion of the Court whenever a mortgagee, after order absolute, has to any extent dealt with the lands. It is not, however, necessary for the decision of the case before us to go more fully into that subject. Were that to be attempted it would probably be found that there is little or no real difference in the views put forward by the late eminent Master of the Rolls, and the equally eminent late Chancellor of Upper Canada, and that both those Judges would agree that what has in every case to be considered is whether, under the circumstances, the foreclosure ought to be opened. The Master of the Rolls gives a variety of illustrations of the considerations which may properly influence the exercise of this discretion, dealing, amongst other positions, with that of a purchaser. To those which

he discusses, there might of course be added the consideration of the nature of landed property in this country, which, while not depriving the Court of its power to interfere, even with a purchaser, would perhaps call for a stronger case on the part of the mortgagor who asked to be let in to redeem.

Having regard to the fact that the sale to Grattan was before the order absolute, and with express notice of the nature of the title he was buying, I cannot find any substantial distinction between the facts of this case and those in *Campbell v. Holyland*; and the circumstances appear to me to make as strong a case for relief as did those in either *Campbell v. Holyland* or *Platt v. Ashbridge*.

It was suggested that the recent case of *Heath v. Pugh*, 6 Q. B. D, 345, 7 App. Cas. 235, has affirmed some doctrines which apply to the questions before us, by shewing that the effect of a foreclosure is more stringent than as formerly understood.

I do not understand that important decision to settle any point of that kind. What was there in question was the time from which, as against a mortgagee who had foreclosed, the right of entry was, for the purposes of the Statute of Limitations, to be reckoned. It was held that upon an order absolute being granted, a right accrued to the mortgagee which he did not before possess, and which, though formerly cognizable only in equity, stood, under the Judicature Act, on the same footing, with regard to the Statute of Limitations as the right which formerly could only have been asserted in a Court of law. The effect of the foreclosure is tersely expressed by Lord Selborne, in a passage quoted by the Chancellor, from 6 Q. B. D. p. 360, and which reads thus: "The effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released." This is not put forward as new doctrine,

for Lord Selborne goes on to shew that it had been stated by Lord Hardwicke, Sir Wm. Grant, Sir Lancelot Shadwell and Lord Manners, whose dicta he quotes. It is a statement of what was always the effect of an absolute order, and must be understood as made for the purpose of the discussion of the question then before the Court of Appeal, and not as having any reference to the question now before us, or as implying that a mortgagee who obtains an absolute order is not at liberty now, as he always was, to treat the debt as still subsisting and, by suing for it, to re-open the foreclosure; or that he is not still under the correlative liability to have it opened by the Court. This is pointed out by the learned Chancellor in his remarks, after quoting the passage I have read.

My opinion that the petitioners ought to have the relief they ask for, does not involve the decision of the questions raised by Mr. Bain when he contended that the order of 1st May, 1882, was nugatory by reason of the plaintiffs having, before that date, sold the land to Grattan, who had not been made a party to the action, and that this petition is one which comes under General Order 117. I do not think we require to decide either of those questions.

Neither do I think it of much consequence to inquire closely whether John Hill was ever really informed that proceedings were going on to foreclose him, or whether James Hill escaped all the missives addressed to his supposed places of residence. Those matters would only be important, as it strikes me, so far as they bore on the question of the delay in making provision to redeem the mortgage, and as far as that question ought to influence the Court in dealing in its discretion with the prayer of the petition. In my judgment the forbearance of the plaintiffs to disturb the possession of John Hill, or to exercise with regard to the land itself any of their powers, or even to proceed to make absolute the foreclosure, until just before this petition was presented, are very strong circumstances in support of the claim to be allowed to redeem.

I certainly share the doubt expressed by the learned



Chancellor of the ignorance on the part of the Hills of these proceedings, which doubt is not lessened by the absence of any deposition by the daughter of John Hill, who must have known all that went on; or by the absence of any statement from James Hill, who is stated to have returned to Canada, except his affidavit made in Michigan, or by his reticence in that affidavit respecting his residence during the time in question. On the other hand, however, he directly denies knowledge of the proceedings, and we do not hear that he was cross-examined, or that the source of information from the registration of the letters, was followed up; and the statement that the deputy sheriff carried away the office copy of the bill from John Hill, is apparently consistent with our finding a letter on the subject of the foreclosure suit written to the plaintiffs' solicitor by the solicitor whom the deputy sheriff tells us he employed to prepare the power of attorney for James Hill.

We allow the appeal, without costs; and make an order to open the foreclosure on the usual terms of payment of principal, interest, and the costs of Trinity College and of Grattan, not including any costs of the appeal, but including any costs incurred by Grattan in connection with his purchase of the property.

In default of such payment within three months from the delivery of this judgment, that is to say before the first day of October next, this order to be vacated and the appeal dismissed with costs (*a*).

OSLER, J.A.—Up to the 1st May 1882, that is to say, up to the day when the decree and final order of foreclosure were made absolute and confirmed under G. O. Chy. 116, the defendants might have applied for leave to come in under G. O. Chy. 117, and to answer, for the purpose of having the accounts taken as between themselves and the

(*a*.) Counsel for Hill subsequently asked to have the time for payment extended, in order that the accounts might be taken after taxation. Accordingly, the time was extended until the 1st of November.



mortgagees, on shewing some reasonable ground for doing so: *Inglis v. Campbell*, 2 W. R. 296. Grattan, therefore, who bought some time before the order of the 1st May, is not in the position of a purchaser after the decree and final order of foreclosure had become absolute; and the question would seem to be, whether in the circumstances the delay which occurred between the date of that order and the presentation of the petition was so great as to induce the Court to refuse relief. Treating the case as that of a sale within the time allowed for redemption by the usual decree, or before effectual final order had been made, and I do not see how full effect can be otherwise given to G. O. No. 116, providing that a decree such as that in question here is not to be absolute for three years, I think the authorities which I have referred to below warrant us in opening the foreclosure, and giving the defendants a further opportunity to redeem.

I refer to *Waddell v. McColl*, 2 Ch. Ch. R. 62; *Brothers v. Lloyd*, *Ib.* 199; *Johnston v. Ashbridge*, *Ib.* 25; *Ford v. Wastell*, 6 Hare 229, 2 Ph. 591; *Thornhill v. Manning*, 1 Sim. N. S. 451; *Prees v. Coke*, L. R. 6 Ch. 645; *Campbell v. Holyland*, 7 Ch. D. 166.

BURTON, J. A., concurred.

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## GREEN ET AL. V. WATSON.

*Patent right, assignment of—Covenant to warrant and defend assignee.*

In 1875 J. R. obtained letters patent for improvements in "Harvesters," and sold and assigned to the plaintiffs the exclusive right to manufacture and sell the same, and to sell such right to other persons. In the same year the plaintiffs executed a deed to the defendant, assigning to the defendant the exclusive right to manufacture and sell such "Harvesters" in certain counties, he paying \$10 royalty on each one to be manufactured by him. It was then covenanted by and on the part of the plaintiffs that the original patentee, J. R., would warrant and defend the defendant in the possession of the said patent within the territory thereby granted, and further agreed that if J. R. neglected or refused to protect and defend him in his peaceable possession of the said patent, then the royalty agreed to be paid by him should cease.

*Per* HAGARTY, C. J. O., and MORRISON, J. A., that the plaintiffs under this covenant were liable only to the defendant in case J. R. neglected to defend him against all persons having a right to manufacture and sell the machines, not as against mere wrong-doers.

*Per* BURTON and PATTERSON, JJ. A., that the terms of the covenant bound J. R. to protect the defendant against all infringers, the rule of construction of covenants to "warrant and defend," as applied to lands, not having any application in cases like the present.

THIS was an appeal from the judgment of Ferguson, J., as reported 2 O. R. 627, where the facts giving rise to the action, and the agreement between the parties, are fully set forth.

The appeal came on to be argued before this Court on the 9th of June, 1884.\*

*Robinson, Q. C., and Bethune, Q. C., for the appellant.*

*E. Blake, Q. C., and Cassels, Q. C., for the respondent.*

On behalf of the defendant it was contended that the plaintiffs had, by deed, sold and conveyed to the defendant the full and exclusive right to manufacture and sell the article in question in certain counties in Canada. That the plaintiffs had acquired this right from the patentee, and the plaintiffs covenanted with the defendant that the patentee would warrant and defend the defendant in the possession of such patent right. That the plaintiffs also covenanted that if the patentee neglected or refused

\**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

to protect and defend the defendant in his peaceable possession of the patent right, then in that case the royalty referred to should cease. The defendant therefore submitted that the plaintiffs thereby undertook to prevent all persons other than the defendant from manufacturing any article which would be an infringement of such patent right, and in no other way could the defendant be said to have peaceable possession of the said patent right; and it being conceded that there were infringements of the patent rights, and the defendant having called upon the plaintiffs to stop the infringements, the plaintiffs could not recover the royalty referred to until that was done.

The doctrines applicable to warranty of title to lands do not apply to such a contract as this.

On behalf of the plaintiffs it was submitted that the judgment appealed from was correct, and ought to be affirmed, for by the deed in question the plaintiffs did not do more than warrant the title of the patentee to the patent in question. It could not have been contemplated between the parties that the plaintiffs or Royce were to protect the defendant against any wrongful invasion of his territory. If such a meaning were attributed to this instrument, Watson would have the sole right to the patent, and would probably never have to pay any royalties. Watson has a complete right of action against wrongdoers infringing upon his territory. The true interpretation of the agreement in question is that placed upon it by the learned Judge, and the plaintiffs rely upon the reasons of the learned Judge in support of the judgment.

They further submitted, that even if the learned Judge erred in this finding, still the appellant having continued to manufacture under the agreement in question after the alleged infringements, he was estopped from disputing his liability to pay the royalties in question. He availed himself of the patent of the respondents, has taken the benefit of the agreement, and he cannot now escape from payment

of the royalties even if the agreement bears the construction contended for on his behalf.

The authorities cited are mentioned in the report of the case in the Court below and in the present judgments.

June 30, 1884. HAGARTY, C.J.O.—The point presented by this appeal may be briefly stated. John Royce obtained Letters Patent in 1875 for improvements in "Harvesters," and soon after sold and assigned to plaintiffs the exclusive right to manufacture and sell the same, and to sell such right to any other persons, and in the same year a deed was executed by plaintiffs to defendant reciting these matters, and that they had agreed to sell and assign to defendant the right to manufacture and sell the same in certain named territory, and that defendant was to pay \$10 royalty on each machine to be manufactured by him. The deed then granted to defendant the sole and exclusive right to manufacture in said territory, and then this covenant—"And the said parties of the first part further agree to and with said party of the second part that the said John S. Royce, the patentee hereinbefore mentioned, will warrant and defend the said party of the second part in the possession of the said patent right within the territory hereinbefore granted.

And if the said Royce neglects or refuses to protect and defend him in his peaceable possession of the said patent right, then and in that case the royalty herein agreed to be paid by him shall cease."

It was held in the Court below, "that the covenantors only undertook that the said Royce should protect and defend the defendant in the peaceable possession of the patent right within the territory assigned, as against all persons having any right to manufacture or sell the patented article within the same territory, and that said covenantors did not undertake that said Royce should protect defendant in such possession and enjoyment as against mere wrongdoers, or that he should bring and prosecute with success a suit against each such wrongdoer."

The defendant appeals from this restricted view of the covenant.

It was conceded, on the argument before us, that if this had been the transfer of an estate in land, the covenant thus framed would not extend to the acts of mere wrong doers. But it was urged that the rule did not apply to such a covenant on such a subject as that of the assignment of a patent right.

We have not been referred to any authority expressly deciding that there is such a distinction in the construction of the covenant to warrant and defend. In the absence of any such, I am at a loss to see why such a distinction should be held to exist.

In the case of land, it seems to be considered as in effect a covenant for quiet enjoyment, not against all the world, but against any person claiming lawfully by any better title than the covenantor affects to give.

In *Platt on Covenants*, 313, the subject is thus discussed : " A general covenant for quiet enjoyment was in earlier times holden to extend to tortious evictions or interruptions, but this doctrine was never freely acquiesced in; and a different rule is now established; so that at present, when we speak of a covenant providing against the acts of all men, it is to be understood of all men claiming by title, for the law will not adjudge that the wrongful acts of strangers are covenanted against. Hence if one who has no right ousts or disseizes a purchaser, he shall not have an action of covenant against the vendor; the reason being, that the law has already furnished the means of redress by giving the injured party an action of trespass against the wrong doer."

At p. 314 are given the reasons laid down by Vaughan, C.J., in *Hayes v. Bickerstaffe*, Vaugh. 122, why this interpretation should be given, *e. g.*, because it would be unreasonable that a man should covenant against the tortious acts of strangers, impossible for him to prevent or probably to attempt preventing; and the convenator be made to defend a man from that from which the law defends every man, that is, from wrong; and that thus there would be a double remedy for same injury, against the covenantor and also against the wrong doer; and further, there would be no difficulty in the lessee secretly procuring a stranger to



make a tortious entry that he might therefore charge the covenantor with an action.

See also *Com. Dig.* "Covenant" E., "Condition" E.; *Sugden, V. & P.*, 601 (14 ed.); *Rawle on Cov.* 134.

In the case of personal property, I cannot see how a covenant to warrant and defend the vendee in the quiet enjoyment of the thing sold should have a wider application.

Personal property would be naturally as much, if not certainly more open to tortious interference than realty, and the law could hardly ever hold a seller to a liability to protect the possession against a world of possible wrong doers.

In *Weed v. Covill*, 14 Barb. 243, it was held that "warrant and defend" in a chattel mortgage was merely a covenant for title, and not that the mortgagor would forever keep the property or protect it.

It is argued here, why expect the assignee for a small territory to undertake the protection of the patent from wrongdoers?

It may be certainly as reasonably urged, on the other side, why throw such a burden on the inventor, who generally has his hands full in defending his patent from attack on the usual grounds urged against its validity?

Here it is agreed that the patentee will warrant and defend the assignee "in the possession of the said patent right," and again it speaks of "protecting him in his peaceable possession of the said patent right."

Are not these words fully answered by confining their operation to guarding the *right* of the assignee?

An infringer, without claim or existence of right, may no doubt interfere with the assignee's profits and monopoly of manufacture, but the possession of the patent right remains unaffected so long as nothing is claimed or put forward against the validity of the patent or the title derived from the patentee.

It seems to be customary in England to provide specially for the obligations of the assignor of a patent.

An example of this is in the case cited of *Henderson v.*

*Mostyn Copper Co.*, L. R. 3 C. P. at 211. After the covenant for enjoyment as against grantor, &c., it proceeds to provide against any infringement by anyone, and that the assignor shall assume the putting a stop thereto, &c. Willes, J., speaks of this as "an extension of the ordinary covenant for quiet enjoyment."

I do not discuss what the parties may have meant by the deed, beyond what I consider the legal import of the words they have thought proper to use.

My judgment does not depend on the existence or absence of such a right. It is based solely on what I believe to be the legal effect of the words used.

The assignee of a patent right would, I presume, have the right of action against infringers, even when the right was merely for a limited territory.

A mere licensee is said to have no such right.

I think the appeal should be dismissed, with costs.

BURTON, J.A.—I share the difficulties expressed by my learned brothers in placing a satisfactory construction upon the words of this covenant. The covenant is not only very inartificially drawn but is, I think, drawn under an entire misconception of the relative rights of the parties to it.

The monopoly granted to Royce is for one entire thing—for improvements in harvesters.

By the 22nd section of the Patent Act the patentee may assign his whole interest or any part of it, but by an assignment of a part the patentee and his assignee become joint owners of the patent according to the respective proportions which the assignment creates.

He may also grant and convey an exclusive right to make and sell the invention patented within any specified limits, and that is what has been done in the present case. The effect of this is, to vest in the assignee the right to exclude even the patentee himself, as well as others, from manufacturing or selling within those limits.

Does not this necessarily vest in the assignee the right and the sole right to bring an action against anyone for

infringing, for it could not be the intention of the Legislature to permit several monopolies to be made out of one, and divided among several persons within the same limits. The legal right to sue must in my opinion be in the party who has the exclusive right to the use of the monopoly. If it is not an exclusive right of the entire and unqualified monopoly in the limits specified, but the right is given to be enjoyed in common with others or the patentee retains a right to manufacture or sell himself within them, then it is a mere license, and the only party to sue for an infringement would be the patentee, the legal owner of the monopoly.

If there ever existed any technical difficulties in the way of the assignee of all the right and interest of the patentee in a patent except in certain specified localities maintaining an action for infringement in his own name, for which I doubt whether any sufficient reason ever existed, they are I think removed under our present patent law, which provides that every patent for an invention shall be assignable at law either as to the whole interest or as to any part thereof by any instrument in writing, but such assignment, and also every grant and conveyance of any exclusive right to make and use the invention patented, shall be registered, and every assignment affecting a patent for invention shall be deemed null and void against any subsequent assignee, unless so registered. Language almost identical with that used in the patent law of the United States.

It is true that in their statute they have gone somewhat further, and have in express terms provided for the recovery of damages in these words: "And such damages may be recovered by action on the case in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or grantees of the exclusive right within and throughout a specified part of the United States." I incline to think, however, that these provisions, though properly inserted with the view to remove all doubts, were not necessary.

Section 23 of our Act provides that the infringer shall be

liable to the patentee, which must be read in connection with the previous section, otherwise even the assignee would not be entitled to maintain an action, and it is quite clear that the patentee could not after assigning it; but read in connection with section 22, "patentee" may well be read as meaning the party legally entitled to the exclusive enjoyment of the monopoly or part of it for the time being.

In the case of *Dunncliffe v. Mallet*, 7 C. B. N. S., 209, it is said by one of the Judges, (p. 28) "I see no reason to doubt that an assignment of a separate and distinct part of a patent is valid. No authority has been cited to the contrary. \* \* Assuming then that the plaintiffs are legally assignees of part of the patent, the question is, whether it is competent to them to sue alone. \* \* The action is brought in respect of the infringement of one particular part of the patent which is vested solely and exclusively in the plaintiffs."

If that be so, and we find the Legislature treating an assignment of the patent or a part of a patent, and the grant or conveyance of an exclusive right to make and use the patented article within certain specified limits as on the same footing, it seems to me very difficult indeed to say that an assignee of the whole or of part, or the grantee of such an exclusive right as I have mentioned, is not the only person who could maintain a suit for an infringement.

The distinction is in fact between the rights of such an assignee or grantee and a mere licensee, and that I understand in the United States cases which have been quoted to be the rule which has been there adopted.

In *Gaylor v. Wilder*, 10 How. 477, it was held that the grant of a territorial right must be absolute and exclusive, and there being a reservation in favour of the assignor, it amounted only to a license, and did not enable the assignee to sue in his own name. And so in *Suydam v. Day*, 2 Blatch. 20, it was held that under the statute an exclusive right of action exists in favor of a sole assignee only in two cases, viz., where he acquires by assignment the whole interest in the patent, or by grant of conveyance of the whole interest



within some particular district or territory; and therefore where the assignment was made of part of a patent, as to use the improvement in the manufacture only of a particular kind of goods, it was only a license; and suit for the infringement had to be brought in the name of the patentee only; whilst in *Wilson v. Rousseau*, 4 How. 686, it was held that the grantee of an exclusive right to construct and use within a certain town could maintain an action in his own name.

In the case to which we were referred of *Henderson v. The Mostyn Copper Co.*, L. R., 3 C. P. 202, all that the defendants obtained by their grant was apparently a license, and, if so the patentee was the only person entitled to sue; and I was at first inclined to think that, as Watson would in my view be the only person who could, under the circumstances maintain a suit for the infringement, it went very far to support the contention of the respondent that the covenant must be held to amount to a mere warranty of the validity of the patent. It furnishes a strong argument, no doubt, but after all we are driven back to the point from which we started. What did the parties mean when they used the words, "protect the grantee in the peaceable possession of the patent right?" It is an ambiguous phrase, not easily intelligible, but in construing the covenant we must consider what it was that was granted—it was the right to make the machines within certain specified limits. How is he to be protected in that, but by the active and actual institution of proceedings by some one to punish and restrain the infringement.

It is not very material in whose name that is done, but it was of the deepest interest to the grantee of the right, when he was liable to pay a large royalty upon each machine, that he should be protected in the enjoyment of the right, and that he should not incur the expense of the proceedings. It appears to me that in substance it amounted to this: The purchaser says, "I am willing to pay you a large royalty for the right to make and use these machines, but I must be protected in the full and peaceable enjoyment of that right, and if it is necessary that the patentee should take



proceedings for the purpose of securing that right, I wish you to guarantee to me that he will do so." But the substance of the covenant was that he was to be protected, that he was not at his own expense to take those proceedings, but that some one should do it; and both covenantor and covenantee, erroneously perhaps, supposed that the patentee was the only person who could.

I do not see (upon very full consideration, but after all I must say not without doubt) how effect can be given to this covenant, except by holding that it extends to the taking all necessary proceedings against all infringers upon being notified to do so, and I see no injustice in it. There can be no cesser of the royalties, except upon the neglect or refusal of the patentee to do what the defendant's grantor has covenanted he shall do.

I agree with my brother Patterson in thinking that the cases on a warranty of lands have no application.

I think, therefore, that the appeal should be allowed, with costs.

PATTERSON, J. A.—To an action for royalties covenanted to be paid on each machine manufactured by him under the plaintiffs' grant of the exclusive right to manufacture and vend in defined localities, the defendant pleads a breach by the plaintiffs of their covenant that the patentee (not the plaintiffs, but one Royce) "will warrant and defend the said party of the second part in the possession of the said patent right within the territory hereinbefore granted. And if the said J. S. Royce neglects or refuses to protect and defend him the said party of the second part in his peaceable possession of the said patent right, then and in that case the royalty herein agreed to be paid by him shall cease."

The questions decided in the judgment appealed from are that the covenant does not extend to protect the defendant against persons wrongfully infringing the patent, that point being decided against the defendant, who appeals; and that, in case the covenant is broken, the defendant is

relieved from the payment of royalties, but is still at liberty to manufacture and sell the machines ; to which construction the plaintiffs object, contending that they are, notwithstanding the breach of their covenant, still entitled to royalties on all machines manufactured by the defendant.

This last point only arises for decision in case we find the first in favour of the defendant. In the meantime I content myself with saying that I see no reason to doubt the correctness of the view expressed by the learned Judge in the Court below.

I do not profess to understand, without some haziness, what is meant by the covenant to warrant and defend one in the possession of an acquisition so intangible as a patent right ; or, as it is expressed in terms intended to be synonymous, to protect and defend one in the peaceable possession of the patent right.

The deed recites that Royce, the patentee, sold, assigned, and transferred to the plaintiffs, their executors, administrators, and assigns, the full and exclusive right to manufacture the patented article, and also the exclusive right to sell to others the right to manufacture and sell it ; and the plaintiffs grant, bargain, sell, assign, and set over to the defendant the exclusive right to manufacture and sell it in certain described localities.

The question chiefly debated before us was, what was meant by warranting or protecting and defending the defendant in the peaceable possession of the patent right within the territory specified ?

People who, for the purpose of this argument, are assumed to have no right under or against the patentee, have manufactured and sold the same machine within the territory to which the defendant's exclusive right extends.

The question is, whether the plaintiffs have covenanted that Royce shall take proceedings to stop such unlawful infringements of the patent ; or is Bryce only to protect the defendant against those who may have a legal right to manufacture, either because the patent is invalid, or by virtue of a license from the patentee or from the plaintiffs themselves.

If the latter construction is the true one, it strikes me as affording a very inadequate protection to the defendant.

He may or may not have a right to prosecute infringers in his own name. Our patent law contains no such provision as that found in the United States statute, which gives an action to anyone interested as patentee, assignee, or grantee, which under the decisions—some of which were cited to us by Mr. Blake—extends to a grantee of the exclusive right in his locality. I do not think the incident of the defendant having or not having a right of action bears on the discussion, except as an argument for or against the reasonableness, as a matter of bargain between the parties to the deed, of one reading or the other of the language they have used; and it is seldom safe to let considerations of this kind, on which minds naturally differ, enter into the interpretation of a written instrument. I may say, however, that the assumption that the defendant has a right of action against wrongdoers does not aid me much in regarding the covenant as more adequate or even more intelligible. The patentee is the person who knows whether an infringement is wrongful or not, and will usually be the proper, if not the only, person to supply information and proof necessary to conduct a prosecution successfully. He is no more bound here to aid in a prosecution than to institute one. A prosecution can, of course, only be successful when the infringer is a mere wrongdoer. Against others the patentee himself cannot protect his licensee. And further, if we read the covenant as having any reference to prosecuting infringers, and assume that the grant to the defendant, which excludes the right of all persons, including the patentee, gives him the right of action which otherwise would belong to the patentee, it follows that the patentee cannot prosecute one who infringes under a claim of right any more than he can prosecute a mere wrongdoer, or the infringer may have two actions against him for the same act.

The rights and remedies required for the practical protection of the licensee are of the kind expressly set out in

the covenant in *Henderson v. Mostyn Copper Co.*, L. R. 3 C. P. 202, where it is the patentee who is to take proceedings upon receiving notice of the infringement.

I do not mean to say that even if the effect of the grant by the patentee to the plaintiffs is to divest the patentee of the right of action for any infringement whatever, and even if the plaintiffs' grant to the defendant conferred on the defendant the sole right to sue for infringements committed in his territory, the covenant would be on that account inoperative. A covenant to warrant and defend your grantee in the quiet enjoyment of land binds you to defend him notwithstanding that an action for trespass must be brought in his name. I merely discuss this topic in order to explain that it seems to have no direct bearing on the question of construction; and that as far as considerations of reasonableness are admissible, I think the grantee, who pays a royalty on each article for the exclusive right to manufacture in the locality, ought to be protected by his grantor against persons manufacturing in defiance of the patent right.

I have not been convinced that we gain assistance by referring to the operation of the word "warrant" in covenants concerning title to land. The subject matter of this covenant is very different from land, and even from incorporeal interests in land. It is not a specific thing which is to be enjoyed. It is only a right to produce a certain kind of article. The technical signification which the word has acquired with reference to land does not necessarily govern its application in this case; and, besides, it is here obviously used as interchangeable with the word "protect," which word "protect," and not the word "warrant," happens to be that employed in the clause relating to the cesser of the royalties, with which we have more immediately to deal.

We have then to say, if we can, what was meant by the undertaking that the defendant should be protected and defended in the peaceable possession of the patent right in his territory.

The peaceable possession of a patent right is not an appropriate phrase or one that conveys a very definite meaning. Different minds may easily construe it differently, if indeed anyone can venture to say he does more than conjecture what is meant by it. We ought certainly to apply to it the rule that a promise is to be interpreted in the sense in which the promisor apprehended at the time that the promisee received it. And we should in my opinion divest ourselves of the notion, which I take to be a mistaken one, that the word "protect" was used by the parties as merely equivalent to the word "warrant" when technically employed in a conveyance of land. If we do this I do not see much difficulty in understanding the covenant as an undertaking that active steps should be taken to protect the defendant by preventing others from exercising the right which was granted exclusively to him.

The words "peaceable possession," though not well chosen, are, I think, more intelligible, and the word "protect" has more nearly the force likely to have been attributed to it by the parties in this view, than that adopted in the Court below.

We have not now to consider what notice the defendant would be required to give to the covenantors or the patentee to entitle himself to call for their interference for his protection, the parties having by agreement forborne to discuss that topic.

This contest causes one to regret, as we so often have to do, that people enter into contracts either without having themselves any distinct idea of what they agree to, or without taking the pains to set down in intelligible language what is in their minds. When this occurs, they cannot be surprised if their contracts are construed differently from what they supposed they were. They have to take the risk of differences of opinion. I have given my own views without any feeling of certainty in their correctly interpreting the intention of the parties, and as the best conjecture I can make as to their meaning.

My conclusion is, that we should allow the appeal.



MORRISON, J. A., I agree in the views expressed by his lordship, The Chief Justice, and think that the appeal should be dismissed, with costs.

The Court being thus equally divided the appeal was dismissed, with costs; and the judgment appealed from stands affirmed.

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PETRIE V. HUNTER ET AL.

GUEST ET AL. V. HUNTER ET AL.

*Mechanics lien—Contracts—Sub-contractor—Statute of Frauds.*

The defendant H. contracted with the defendant C. for the building of a house. A clause in the agreement gave H. a right to dismiss C., and employ others to finish the work, in the event of C.'s failure to carry out the contract. H. acting thereunder dismissed C. and agreed verbally with the respective plaintiffs P. & G., who had sub-contracts under C., that if they would proceed with their respective portions of the work, and finish the same, he (H.) would pay them.

*Held*, affirming the judgment of Boyd, C., 2 O.R. 233, that the agreement with P. & G. was a new and independent contract, not a promise to pay the debt of another, and that P. & G. were entitled to liens for all work done under such agreement with H. as contractors.

THIS was an appeal by the defendant Hunter, from the judgment of Boyd, C., reported 2 O. R. 233, where, and in the present judgment, the facts are fully stated. The appeal came on to be argued on the 6th of June, 1884. \*

*J. Reeve*, for the appellant.

*D. Black*, for the respondents.

The points raised, and cases cited, appear in the report of the case in the Court below.

\**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

June 16, 1884. HAGARTY, C. J. O.—I think it clear on the evidence that under the eleventh clause in the contract the contractor Coatsworth was dismissed from his position.

Authority was thereby given “to dismiss the contractor, and to employ other persons to finish the work in such a manner as the architect may direct, and all sums of money which shall be paid on account thereof shall be deemed a payment on account of the contract, but without prejudice to the right to recover any money in excess of the contract price, which may be paid for so finishing the works, or any other damage caused by breach of this contract.”

The dismissal took effect about the 26th June. The contractor fully admitted his inability to continue or complete the work unless he obtained more money from defendant, who was entitled to retain fifteen per cent till after completion.

He expressed himself satisfied that the work could be completed for the contract price, leaving a balance in his favour.

He had made sub-contracts for plastering with plaintiff Petrie, and for plumbing with plaintiff Guest.

He seems to have arranged with defendant Hunter that the latter should take the completion of the work into his own hands, that he was to adopt the contracts made with Petrie and Guest, and they would complete the work contracted for by them under their contracts, and that defendant should pay them therefor; and any balance of the old contract price remaining unexpended in Hunter's hands should be paid to him, Coatsworth.

Hunter then assumed the completion of the contract. Petrie and Guest agreed to finish their work respectively, and I think it is reasonably clear on the evidence that Hunter agreed with them so to do, and promised to pay them therefor on the scale of their contract prices; that whatever work was done after the 26th June was done by the plaintiffs solely on Hunter's credit, and on the faith of his direct promise to pay them therefor; and

that but for his express promise to pay them, they would not have done any more work after Coatsworth's dismissal.

Their claims must, I think, be wholly restricted to the work done after June 26th.

The only objection to their recovery of a claim so obviously just is the highly technical one, that Coatsworth was also responsible to them for this work, and that therefore the promise of Hunter was necessarily a promise to pay the debt of another, and therefore must be in writing.

Had Coatsworth not been dismissed from further prosecution of his contract, and his sub-contractors, distrusting his solvency, had declined to perform their work unless Hunter would promise to see them paid, and he so promised verbally, it is clear the objection must have prevailed, and the case would have been within the statute; and even had they completed their work, trusting wholly to the new promise, they could not have recovered. The case would have fallen within the law as laid down in the two cases cited from 37 U. C. R.; *Poucher v. Treahey*, (p. 367); *Bond v. Treahey*, (p. 360.) But the case before us stands on very different ground.

Coatsworth states expressly that neither Petrie nor Guest completed their sub-contracts under him, but that they did so for and under Hunter, he accepting them as contractors, and agreeing to pay them, and that Hunter took charge of and so finished the work.

Now, in this view it is not easy to see how the work done by plaintiffs after the 26th June, and which they swear was only done by them on Hunter's direct promise, can be said to be work done for Coatsworth, and for which he was liable in the same degree as Hunter.

If, without Hunter's direct promise to pay, the plaintiffs had refused to proceed and finish on Coatsworth's responsibility, he being dismissed from further prosecution of the contract, they could hardly have recovered from Coatsworth the whole sub-contract price, as they had not performed it.

He might be liable to them in an action for breach of contract for his default and dismissal, and thus preventing

them obtaining the benefit and profit of fulfilling their sub-contract, or they might have recovered *pro tanto* for the work done up to 26th June; but I cannot consider, on the facts before us, that the work done for Hunter after that day on his credit and promise, that Coatsworth was liable in the sense of many of the cases in which it was properly held that the promise relied on was merely collateral to the promise and liability of a principal debtor. The consideration here was direct between Hunter and the plaintiffs, and his promise was to pay from a fund transferred by the new arrangement, as it were, into his hands, and subject to his own disposition, viz., the amount remaining unpaid on the original contract. By Coatsworth's dismissal this fund ceased to be available for the purposes of the original contract, and was agreed to as otherwise appropriated.

If I rightly understand the judgment of the Exchequer Chamber in *Mountstephen v. Lakeman*, L. R. 7 Q. B. 196, finally confirmed in the Lords, L. R. 7 H. L. 17, it seems to me that the Court recognize that there may be cases in which a man may, by unequivocal language, make himself liable to another without writing, although another person may be liable for the work.

Mr. Justice Willes says, p. 203: "The facts seem to exclude, and the jury might well find that they excluded the notion of the defendant becoming surety for a liability either past, present, or future upon the part of the board; and they might look upon the defendant's contract as a contract to pay whether the board have been, are, or shall be liable or not. 'Do that work now, and you shall be paid for that work.' So that it is a case of principal liability."

Cleasby, B., appears to take the same view: "Does that conversation, coupled with the surrounding circumstances, warrant the conclusion that the defendant intended to make himself primarily liable, or liable only on the failure of somebody else who was the principal debtor."

In the Lords I think Lord Cairns, L. R. 7 H. L. 17 seems to view the case in the same light.

He says (p. 20) the whole question is, "Whether there was or was not evidence of an original liability on the part of defendant to pay the plaintiff in the action for the work to be done."

Lord Selborne points out an error in some of the views expressed in the Queen's Bench, whose judgment was overruled as to there being a contract of suretyship, although there was no principal debtor. He points out that the board was in fact not legally liable, so that there was really no principal debtor. I do not understand him as questioning any other point in the judgments delivered in favor of plaintiff either in the Exchequer Chamber, (whose judgment he affirmed), or by the other Law Lords.

It must not be forgotten that work done as this was for the direct use and benefit of defendant, was such as would at law, without any proof of promise or request, imply a promise to pay.

If a contractor, in the midst of his contract, absconded from the country for any reason, and the persons working under him were expressly hired (without writing) by the owner of the work to proceed with it to completion, and on his express promise to pay, the argument of the appellant here would prevent his being held liable on the ground that the absconding contractor was also liable to the working men for the whole work down to completion. This would be on the assumption that the owner's promise was merely as a guaranty for the absent defaulter. But this would be contrary to the very nature of the new contract. It would be really a direct personal pledge of responsibility, and in no way in the nature of guaranty or suretyship.

I do not consider that the statements or proceedings of plaintiffs as to holding Coatsworth liable as well as defendant should be held to alter the true nature of their dealing with defendant for the work done after 26th June. It was, as I take it, an after-thought on their part, subsequent to the making of the new contract with defendant.

It would be a useless task to attempt to reconcile the



multitude of cases and opinions of text writers on this curious point on the Statute of Frauds.

I think it would be a most unfortunate application of a most useful enactment to defeat a just claim like that before us if we adopted the appellant's view.

I can see no objection to the owner of a building in process of erection, having legally dismissed his original contractor, and taken on himself the completion, to agree with the sub-contractor to finish the uncompleted work on his direct promise to be the paymaster.

I think the appeal should be dismissed, with costs.

I do not think it correct in the decree to speak of the contract as being "cancelled." It would be more correct to speak of the contractor being dismissed from further performance.

PATTERSON, J.A.—I concur in the judgment just delivered by his lordship the Chief Justice.

The defendant appears to take two inconsistent positions. He took the work out of the hands of Coatsworth, the contractor, under the power contained in the contract to "dismiss the contractor, and to employ other persons to finish the works in such manner as the architect may direct." Therefore he cannot say, and he does not say, that after 26th June Coatsworth was doing the work. He had assumed it himself and was doing it himself. Yet he resists the claims of these plaintiffs on the ground that they were working for Coatsworth and not for him. He may not put his contention in exactly that form, but that is what in substance he asserts when he contends that in paying the plaintiffs for their work he will be paying a debt of Coatsworth's and not a debt of his own, and therefore ought not to be held liable without a promise in writing.

I think the question of the Statute of Frauds may be dealt with by adopting the language of Sir A. E. Cockburn in *Fitzgerald v. Dressler*, 7 C. B. N. S. at p. 392. The plaintiffs in that case had sold linseed which was then on

its way from India, and before its arrival their vendee resold it at an advanced price to a third party, who after its arrival, and while it was in store at the London Docks sold it at a further advance to the defendants. The plaintiffs gave the defendants a delivery order on their verbal promise to pay the price falling due to the plaintiffs from the first vendee. Cockburn, C. J. said : " We are all agreed that the case is not within the Statute of Frauds. The law upon this subject is, I think, correctly stated in the notes to *Forth v. Stanton*, 1 Wms. Saund. 211 c. [p. 233 in ed. of 1871,] where the learned editor thus sums up the result of the authorities : ' There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases ; but the fair result seems to be, that the question whether each particular case comes within this clause of the statute (s. 4) or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage ; for though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property—it being, as I think, truly stated there as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default or miscarriage of another, where the person making

the promise has himself no interest in the property which is the subject of the undertaking."

This language will, with a very slight adaptation, literally apply to the present case, where the work, in consideration of which the defendant gave his promise, was work in which he had a direct interest, and where moreover the payment claimed by the plaintiffs, while it might relieve Coatsworth from liability in some shape to them, was a payment of money which the defendant was bound to pay for the doing of that very work whether he paid it to the plaintiffs or to Coatsworth.

BURTON and MORRISON, JJ. A., concurred.

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## ALEXANDER V. WAVELL.

*Assignment for benefit of creditors—Trustee to be at liberty to carry on trade—Discretion of trustee—R. S. O. ch. 118.*

A deed of assignment for the benefit of creditors, gave power “until the said trustee shall deem it advisable to dispose of the said business, to carry on the same, employing any person or persons as his agent or agents for such purpose if he deemed it best, paying him or them such reasonable allowance therefor as may be agreed upon, and to supply the said agent or agents with such goods or merchandize as may be requisite for such purpose,” and the trustee was not to become liable for the debts or losses of the said business in any way except for the distribution of the moneys come to his hands under the deed. There was no evidence of any intentional dishonesty on the part of the assignor :

*Held*, (reversing the judgment of the County Court) that this provision did not invalidate the deed under R. S. O. ch. 118.

HAGARTY, C. J. O., dissenting.

THIS was an appeal by the defendant from the judgment of the Judge of the County Court of Wentworth, refusing a motion made in the July term of 1883, to set aside the verdict and judgment at the trial of an interpleader issue between the parties in favour of the plaintiffs, and to enter a judgment in favour of the defendant.

The plaintiffs were John Alexander, Frank Miller, Edwin A. Miller, and James L. Miller, who claimed the right to hold the goods of one E. Kraft, seized and taken in execution by the sheriff of Wentworth, under a writ of *fieri facias* issued out of the said County Court upon a judgment recovered by the said John Alexander against Kraft.

Kraft was examined as a witness, who proved that he was largely indebted, and unable to pay his debts ; and that by the advice of one of his heaviest creditors he determined to make, and did make, to the defendant a deed of trust for the benefit of creditors, in order that all might obtain a share of his assets.

This deed—a lithographed form—was executed 30th of March, 1881, and contained the usual recitals of indebtedness, inability to pay in full, and agreement to assign all his estate to the defendant upon trust; and he accordingly did convey all and singular his personal estate and effects, stock in trade, household furniture, &c., to hold all the

said estate unto the defendant, his heirs, executors, administrators and assigns for ever, upon trust to sell and dispose of the same in whole or in part, by public auction, tender, or private contract; and to pay and apply the proceeds of such sale or sales in payment of the costs of the deed, and of managing the estate, and all costs in respect thereof, and of the trusts set out in deed, and pay the balance towards payment of the debts of Kraft; and the balance, after payment of debts, to be paid to him; and, until deemed advisable to sell, defendant to carry on the business in his discretion, employing persons to assist him in doing so, and supplying them with goods. Trustee not to be liable for debts or losses in the business in any manner, otherwise than for the distribution of the moneys coming to his hands under the deed, Kraft appointing defendant his true and lawful attorney, irrevocable, to collect all debts and accounts in any manner the defendant might deem necessary to carry out the trusts thereby created.

It was held in the Court below that the provision for carrying on the business, &c., which is set out at length in the judgments in this Court, invalidated the agreement and the defendant thereupon appealed.

The appeal came on to be argued on the 30th May, 1884.\*

*Osler*, Q. C., and *Teetzel*, for the appellant. The question here is, was this deed executed in good faith for the laudable purpose of procuring the debtor's assets to be equally distributed amongst all his creditors? The instrument here in question states expressly that it was executed for the purpose of attaining that end without preference or priority, which brings it within the saving provisions of sec. 2 of R. S. O. ch. 118. The power to carry on the business is only in aid of the main object of the deed, and cannot vitiate it. Fraud is not suggested in this case, and there is not anything in the deed or evidence to raise any presumption against the good faith of both the debtor and

\**Present*.—HAGARTY, C.J.O., BURTON and PATTERSON, JJ.A.



the trustee, or to raise the suspicion that any intention existed in the minds of either to hinder or delay creditors; and even if the effect of carrying on the business of the debtor should have the effect of delaying creditors, the instrument would still be valid and binding. In other words, the deed being *bonâ fide*, the power given to carry on the business, as in this deed, does not take the assignment out of the saving clause of the statute. Besides, the evidence shews that the stock of the debtor being for the most part in an unfinished state, it was only prudent, acting in the interest of the creditors, that provision should be made for the purpose of enabling the trustee to carry on the business.

*W. F. Walker* for the respondents. In this deed a clause is inserted authorizing the trustee to carry on the business, and employ agents, paying for their services, "and to supply such agent or agents with such goods or merchandize, as may be requisite for such purpose." Nothing can be plainer than that this must "hinder and delay" the creditors of the assignor. This is clearly such a deed as no creditor could properly be advised to accept. It is plainly one made in the interest of the debtor not of the creditors.

*Maulson v. Peck*, 18 U. C. R. 113; *Metcalf v. Keefer*, 8 Gr. 392; *Coates v. Williams*, 7 Ex. 205; *Janes v. Whitbread*, 11 C. B. 406; *Boldero v. London and Westminster Discount Co.*, 5 Ex. D.47; *Badenach v. Slater*, 8 A. R. 402; *Meaux v. Howell*, 4 East 1; *Gottwalls v. Mulholland* 3 E. & A. 194, were referred to.

October 15th, 1884.—HAGARTY, C. J. O.—Interpleader issue to try the right to certain chattels seized by the sheriff, on April 18th, 1883, on a *fi. fa.* delivered to him on the same day, in suit of *John Alexander v. E. Kraft*.

The defendant claimed as assignee of Kraft under a deed of assignment, dated March 30th, 1883.

Kraft was in business as a harness maker in Hamilton.

Judgment was recovered against him by plaintiff Alex-

ander, on April 10th, 1883, and the day before another judgment was recovered by other plaintiffs.

The deed recites that Kraft could not pay his debts in full and he assigns all his estate, real and personal, to defendant in trust to sell when and on such terms as he should think proper, with or without security, &c., and to pay and apply the proceeds in payment of costs and expenses of the assignment and of the managing the estate and all costs, &c., in respect thereof, and the balance towards payment of the assignor's debts, without preference or priority,

\* \* "and until the said trustee shall deem it advisable to dispose of the said business, to carry on the same, employing any person or persons as his agent or agents for such purpose, if he deem it best, paying him or them such reasonable allowance therefor as may be agreed upon, and to supply the said agent or agents with such goods and merchandize as may be requisite for such purpose.

Provided that the said trustee shall not by anything herein contained, become in any way liable for the said debts or for losses in the said business in any other way, except for distribution of the money which shall come to his hands hereunder as hereby required."

Then the trustee is appointed the debtor's attorney irrevocable to collect, &c., \* \* "and to act in the premises in whatever way he deems necessary to carry into effect the trusts hereby created."

It appeared in evidence that the debtor had a quantity of saddlery and harness in an unfinished state, and that to be sold to advantage they ought to be finished before being offered for sale.

The defendant is a professional assignee, and he testified that he had the goods finished, but did not supply any fresh stock, and that this course was the most beneficial to the creditors.

There seems no reason to believe that there was any actually fraudulent intent on the assignor's part in making this assignment.

The learned Judge in the County Court, after a careful

consideration, delivered a written judgment holding the assignment to be void against execution creditors, and expressing his concurrence with *Gallagher v. Glass*, 32 C. P. 641.

That case was tried before me without a jury and received my most careful consideration, and after an examination of the authorities I came to the conclusion that a debtor had no right to impose such a term on his creditors as empowering his assignee in his discretion to carry on his business, purchase other goods, employ clerks and agents, &c., &c.

My decision in that case was upheld by a majority of the Court of Common Pleas, but it was clear that two at least of the learned Judges did not concur in the general repudiation of the clause in question.

Since that decision I have examined two cases not previously cited by me.

*Boldero v. London and Westminster Discount Co.*, 5 Ex. D. 47.

It was there held that a deed authorizing the carrying on the trade if thought expedient so to do, was not to be thereby invalidated under the statute of Elizabeth, "which does not touch the question of equal distribution of assets." It was on a special case which (*inter alia*) declared that the assignment was executed for the purpose of enabling the business to be sold out as a going concern. The Court distinguished the case from *Spencer v. Slater*, 4 Q. B. D. 13, by holding that in the case before them the primary object was a transfer for purposes of sale as a going concern and not for the purpose of carrying on the business.

In *Spencer v. Slater*, the assignment was held bad under 13 Eliz. It does not much assist us in the present case, as it was certainly bad for other reasons than the clause as to carrying on the business. This latter clause is noticed as objectionable amongst others.

The precise question for discussion has never, that I am aware of, come before the Appellate Court under our laws.

Our statute R. S. O. ch. 118, sec. 2, declares that if any

person in insolvent circumstances, &c., makes any gift, assignment, &c., of any of his chattels, with intent to defeat or delay his creditors, or to give a preference, &c., every such gift, assignment, &c., shall be null and void as against his creditors. But nothing herein contained shall invalidate, &c., any assignment made for the purpose of paying ratably, &c., and without preference, all the creditors of such debtor their just debts.

The object of any valid assignment under this section, as also its clear legal operation, ought to be the payment of creditors ratably.

The question for our discussion is, whether this substantial requirement can be legally fulfilled by assigning the estate to a trustee who, in place of turning the estate into money, is allowed, in his discretion, to carry on the debtor's business so long as he may deem advisable, to employ clerks and assistants, to apply the assets towards the purchase of new goods, to incur no personal liability in so doing, and to postpone the ultimate realization and distribution of the assets to such period as he may think best.

A creditor obtains his execution in due course for his debt. The sheriff comes to seize, and he finds that the day before the debtor has made over all his property to a person armed with such powers as I have just mentioned.

The creditor may be ready to accept his ratable proportion out of the assets, instead of his whole claim. But he is told in effect that the trustee has determined to purchase fresh stock, and to carry on the business till, in his discretion, the proper time has arrived to realize all.

It may be a well-advised proceeding, and calculated in the end to produce a larger result. It may, on the other hand, be most ill-advised, and calculated to result in large extra expence and ultimate depreciation.

I do not think that the legality of such powers, granted by a debtor to the trustee, should depend on the wisdom or the unwisdom of them in each particular case, according to the position of the estate assigned.



It is either lawful or unlawful for all debtors and insolvents thus, of their own sovereign will and pleasure, to provide for the disposition of their estates.

Disguise the matter as we will, the naked fact remains that the debtor, instead of simply providing for the ratable division of his assets amongst his creditors, affects to make his own terms and times of distribution ; and deals not with his existing assets simply, but with his assets as they may be increased or diminished by the course of dealing with them entrusted by him to the trustee whom he has selected.

It may be said very plausibly that it will not be intended that the trustee will act fraudulently or indiscreetly. The question for us is, whether the debtor shall be allowed to place it in his power so to act.

If it be better in the interests of the creditors that money should be expended in getting the stock into proper order for sale, by the addition of fresh goods, or by the postponement of any attempt to realize until a more distant period, surely that should be left to the creditors for their decision and judgment and not be made to depend on the order or judgment of the debtor.

My learned brother Wilson, C. J., in his dissenting judgment in *Gallagher v. Glass*, (32 C. P. 657,) seems to put it as if the absence of this clause would compel the immediate closing of the business. "To say that it shall not be carried on, however beneficial it may be to them, (the creditors,) for the mere purpose of winding it up to the most advantage, and that it must be closed immediately on the execution of the deed, however disastrous it may be to the creditors, is to lay down as a rule of law that which, in my opinion, is opposed to the plainest principles of law and justice. It is to declare that the creditors shall not determine what measures they conceive to be the best for their own interest."

I fully agree with my learned brother that the creditors should in no way be debarred from doing what they deem best for their own interests in the realization of the assets,



but I hold most strenuously that it should be left to them so to decide, and not to the man who places his assets with such powers in the hands of the trustee he selects.

I cannot see how our refusing such a *jus disponendi* to the defaulting debtor in any way prevents the creditors from agreeing to such a dealing with the assets as they may think most for their general benefit. The decision should come from them and not from their debtor.

The sheriff is approaching him with an execution on which all his assets will be seized and sold. The law allows him to assign these assets for the purpose of paying his creditors ratably<sup>1</sup> and without preference. Is it possible that he retains the right to dispose of these assets except for that direct purpose?

Can he arrange with the assignee whom he selects, that some of those assets, *e. g.*, money, may be applied, not for such distribution, but to purchase goods or hire workmen to carry on the business of buying and selling until the time may come when the assignee may deem it wise to sell?

If we had never heard of any legal decision on the point, I think it must strike us that this is a wide departure from the simple provisions of the statute.

He is allowed to prevent one creditor sweeping away all his assets. I think the Act gives him no power to do more than simply place them in the hands of an assignee for realization and distribution.

I think any departure from this plain course should be left to the creditors.

To one who has been familiar for many years with the various means and devices by which creditors are interfered with in the lawful enforcement of their demands, I think it must be apparent that it should not be left to a debtor unable to meet his engagements to exercise any controlling power over the disposition of his estate, beyond the direct and simple exercise of the powers given him by our statute.

I rest my decision on it, and not on the Statute of Eliza-

beth, and am not prepared to hold that, except as to preferring one creditor over another, the decisions under the last-named Act should govern.

If we hold this assignment to be valid we sanction the large claim that the debtor, so long as he makes no preference, has the right to give full discretion to his nominee as to the manner and time of realization—that a new trading may be established and moneys properly applicable to pay creditors may be spent in purchasing new goods and in paying assistants to carry on the business.

It may be urged that each case could be tried on its merits, whether such directions and powers were honestly given, and were calculated to promote the interests of creditors and proper to be conferred on the assignee under the circumstances.

Our *nisi prius* experience ought, I think, to make us look with much distrust at such a method of trying the validity of the debtor's course. To mention only one difficulty, there would always—especially before a jury—be the question, is it not better to uphold an assignment with such objectionable powers than to hold it void, and thus let in the creditors who had obtained executions to the exclusion of the rest, better to uphold any means of arriving at a final equal distribution than defeat such a desirable result.

I do not propose to review the cases in our own Courts, as they will be found set out in *Gallagher v. Glass*. 32 C. P. 641.

I think the learned Judge of Wentworth was right in his finding, and that his reasons are sound.

The much cited cases of *Owen v. Body*, and *Janes v. Whitbread*, are specially noticed in *Cox v. Hickman*, in the House of Lords (9 C. B. N. S. 89, *et seq.*)

Lord Wensleydale, (p. 100) says of *Owen v. Body*: "It was quite enough for the decision of that case that the subscription exposed the creditors to the peril of being considered partners—of which peril the opinions of the majority of the Judges leaves no doubt; and that prevented the deed from being a fair deed, and good against creditors. *So did the provision that the effects which ought to have*

*been divided equally amongst the creditors should be put in peril by being employed in trade.* The case of *Janes v. Whitbread*, which was distinguished as authorizing a trader to wind up, can hardly be supported on the ground of that distinction." The case is not treated as of very binding authority in *Coates v. Williams*, 7 Ex. 205.

Lord Cranworth (at p. 96), says of *Owen v. Body*: "The Court of Queen's Bench were quite right in holding that the creditors were justified in refusing to execute the deed tendered to them; and that is all that was decided," and in *Janes v. Whitbread*, 11 C. B. at p. 417, Maule, J., says, that the judgment in *Owen v. Body*, "means no more than this, that the deed was not such a deed as it was reasonable to expect a creditor willing to take his fair share of the debtor's property to accede to."

It appears to me, that the deed in the case before us was emphatically one that a creditor should not be expected to accept; and in Lord Wensleydale's view, though willing to accept his ratable share, he was not willing the assets should be put in peril by being employed in trade.

The provision in the deed is not simply to carry on the business, which it might be argued merely meant to go on as it were selling the stock over the counter, but contains in addition the power to supply fresh goods and merchandize for that purpose.

This seems certainly putting the assets "in peril by being employed in trade."

Our statute, R. S. O. ch. 118 (U. C. Consol. ch. 26) appears to me to prevent a person in insolvent circumstances or unable to pay his debts in full, from making any conveyance with intent to delay creditors, or to give one or more a preference over other creditors—that, in effect, what he might have honestly done under the Statute of Elizabeth intending to delay or prefer can no longer be done if made with such intent. That the question is not whether the conveyance be fraudulent or covinous, or intended to reserve or retain some benefit to the assignor, but whether it had the natural effect of delaying or preferring.

The clause, in effect, wholly prohibits such gifts or transfers, but then declares that the insolvent may still make an assignment for the purpose of paying ratably *all* his creditors without preference; and further, to shew its meaning, also excepts from its operation *bonâ fide* sales in the ordinary course of business to innocent purchasers.

The result of all this would be, that the only disposition which the insolvent debtor can make is for the benefit of *all* his creditors without preference.

I think we must decide this case solely on the effect and meaning of our own statute, R. S. O. ch. 118, and not under the Statute of Elizabeth. I do not consider it necessary to hold, that because a deed, made avowedly with intent to hinder or delay a creditor, may be good under the earlier Act, it is necessarily good under our statute.

*Pickstock v. Lyster*, 3 M. & S. 374, and other cases, establish that an assignment for the general benefit of creditors was not vitiated by its being made to hinder or delay one particular creditor who was about issuing execution. The Court said that so far from the conveyance being fraudulent, it was the most honest act the party could do. The case was decided chiefly on *Holbred v. Anderson*, 5 T. R. 237. Lord Kenyon said, "There was no fraud in this case. The plaintiff was preferred by his debtor, not with a view of any benefit to the latter, but merely to secure the payment of a just debt to the former, in which I see no illegality or injustice. The words of the Statute 13 Eliz., do not apply to this case, for this warrant of attorney was given on a good consideration; and the other words in the Act, '*bonâ fide*,' only apply to those cases where possession is not delivered, or where it is merely colourable."

In that case the debtor, knowing a creditor would have execution at once, went to another creditor and gave him a warrant of attorney on which judgment was had at once, and execution given to the sheriff two hours before the other creditor's execution.

The statute professes to be for the avoiding of feigned

covinous, and fraudulent feoffments, gifts, grants, &c., devised or contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors, &c.

In *Kerr on Fraud*, p. 214 2nd. ed., it is stated that "the meaning of the statute is, that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor."

I rest my decision on the broad ground that a clause of this character permits the diversion or application of a portion, large or small, of the debtor's assets from their only lawful purpose to the uncertain hazard of business, and to ventures into which the assignee may embark at no liability on his own part for possible losses.

I think it our duty to declare such a diversion to be illegal, and that the possibly good intentions of the debtor, and the possible ultimate advantage to the creditors, should not be allowed to make it legal.

BURTON, J. A.—The learned Chief Justice appears to treat the declaration at the end of section 2, of the Fraudulent Preference Act, R. S. O. ch. 118, as a substantive enactment. I do not so regard it, but have always considered it as a mere statutory recognition of what ever since the year 1815, if not at an earlier date, had been considered to be the law in reference to assignments for the benefit of creditors, with the variation now rendered necessary by reason of this enactment, that such assignment to be valid must provide for an equal distribution of assets—in other words, an assignment for the benefit of creditors, even though it preferred certain creditors, was from the early period I have named held to be valid under the Statute of Elizabeth, and this is a declaration that such assignments are also under this statute to be held valid if made for the purpose of distributing the debtor's assets without preference or priority. As I have intimated on a former occasion, the



clause in question does not in my opinion add to or detract from the previous enactment, which alone has to be looked to, and what we have to decide is whether there is any thing upon the face of the deed in this case which necessarily leads to the conclusion that it was made either with the intent to defeat or delay creditors, or with intent to give one or more of them a preference over other creditors of the assignor. There is nothing upon the face of the deed from which an intention to prefer one creditor over another can be inferred, and the question must be regarded precisely in the same way as if we were considering such a deed under the Statute of Elizabeth.

There is nothing in the evidence to lead to any other conclusion than that the deed was executed by the debtor in perfect good faith, after consultation with his principal creditor, and for the express purpose of securing an equal distribution of his assets.

The trusts of the deed are first for sale, leaving a discretion to the assignee similar in terms to those which have been held to be unobjectionable in *Badenach v. Slater*, 8 A. R. 402. Then comes the clause which is objected to, viz. :

“And until the said trustee shall deem it advisable to dispose of the said business to carry on the same, employing any person or persons as his agent or agents for such purpose if he deem it best, paying him or them such reasonable allowance therefor as may be agreed upon, and to supply the said agent or agents with such goods and merchandise as may be requisite for such purpose; *Provided*, that the said trustee shall not by anything herein contained become in any way liable for the said debts or for losses in the said business in any other way, except for distribution of the moneys which shall come to his hands hereunder as hereby required.”

The principal trust here is to sell the business either as a going concern or piecemeal, as the trustee shall think proper, and it seems to me that it is subsidiary to that object, that power is given to carry it on till sale.

It would have been a question for the jury in this case

whether the deed was executed as a mere scheme to defeat or delay creditors, or with the *bonâ fide* object and intent of paying and satisfying ratably, and without preference or priority, all the creditors.

The parties assailing the deed did not press that it was fraudulent in fact, but they impeach it as being fraudulent in law upon its face.

There is no express direction to the trustee to abstain from selling for any fixed period, nor a direction to carry on the business. There is nothing to prevent the trustee exercising his freest discretion in the interest of the creditors who were the objects of the trust, a discretion which could be controlled in the event of its being exercised in a manner detrimental to their interests, but there is a power given, which otherwise the trustee might hesitate to exercise, to continue the business in the event of a purchaser not being immediately found.

This of course might be done under such circumstances that the only proper inference which could be drawn from them would be that the assignment was made to defeat or delay creditors, but can it be said that the insertion of such a clause raises an irrebuttable presumption that that was the debtor's intention?

The Statute of Elizabeth was intended to prevent deeds fraudulent in their concoction, and not merely such as might hinder or delay creditors, and therefore an assignment for the benefit of creditors was held at an early day, as I have pointed out, not to come within it. The creditors are of course necessarily to some extent delayed from a fair exercise of this right by the debtor, but the delay is the incidental consequence of an act perfectly just and legal.

The decision in *Janes v. Whitbread*, 11 C. B. 406, has since the decision in *Cox v. Hickman*, never been questioned as good law, and is as applicable, so far as this point is concerned, under our present law as under the Statute of Elizabeth. Looking at the deed, from which it appears that the debtor was a manufacturer, and at the

evidence that he had a shop for the sale of the article so manufactured; and that unless therefore a purchaser was at once found it might be to the interest of the creditors that any unfinished materials should be worked up; and that the first and principal trust is to sell, it is sufficiently apparent; that the carrying on of the trade was merely subsidiary to the general purpose of sale and distribution.

I think that in the construction of such a deed—and that is all that we are at present concerned with—the onus is upon the creditor who assails it of shewing that it is fraudulent in law; that it is a fundamental rule that fraud is not to be presumed; mere conjecture or surmise, however probable or persuasive, is never allowed to establish fraud; unless the power here given is inconsistent with its being merely subsidiary to the general purpose it ought to receive that construction, and that it must be presumed that an assignee will apply a general power which can have a lawful operation to a lawful purpose.

I confine myself to cases in which a discretionary power is given. If the debtor attempts to dictate to his creditors the terms on which they shall take his estate, I adhere to the remark which I made in another case.

The case of *Boldero v. London and Westminster Discount Co.*, 5 Ex. D. 47, is a strong authority in favour of upholding this deed, and there is no distinction, in my view, upon this point between our own Statute and the Statute of Elizabeth, under which that case was decided.

In *Spencer v. Slater*, 4 Q. B. D. 13, the deed was clearly bad on many grounds—among others, a resulting trust to the debtor to the detriment of the creditors who did not assent to the deed within a certain time; and there the primary trust was to carry on the business, not as here to sell.

I am of opinion that there is nothing upon the face of this deed that must necessarily lead us to the conclusion that it is fraudulent and that the plaintiff has failed to make; out his case, and that the appeal ought to be allowed and judgment entered for defendant, with costs.

PATTERSON, J. A.—The plaintiff obtained judgment against Kraft on 10th April, 1883. Kraft had made an assignment to the defendant on the 30th March. I assume, although I do not find it expressly stated, that the judgment is for a debt that existed before the assignment.

The plaintiff impeaches the assignment as offending against R. S. O., cap. 118, sec. 2, and he relies altogether upon what appears on the face of the deed itself.

The learned Judge of the County Court, to whom we are indebted for having put us fully in possession of his views, says, in one passage of his carefully considered judgment, that he does not think any trust deed which places a creditor in the position which he understands this deed to create, can be said to be free from the taint of fraud. But, notwithstanding this expression, I do not understand him to impute intentional fraud or to intend to convey more than that this deed is, in his opinion, rendered null and void under the statute by reason of certain things contained in the deed.

The case has been argued before us solely on the effect of the statute in which the word "fraud" or "fraudulent" does not occur, and without any imputation of intentional dishonesty against the assignor.

The deed is upon a lithographed form, prepared and sold as a general form, adapted to assignments of property of all kinds. The trust first declared is, to sell and dispose of the estate in whole or in part as the trustee shall, from time to time, think proper, giving full discretion as to mode of sale, price, &c. Then he is directed to pay the proceeds of sales and of collection of debts and accounts in payment of the expenses of the deed, and of managing the estate and executing the trusts, and the balance in or towards the payment of the debts of the assignor in proportion to their respective amounts, without preference or priority, with resulting trust for the assignor if any residue remains. Then comes this clause, on which the contest arises :



“And until the said trustee shall deem it advisable to dispose of the said business, to carry on the same, employing any person or persons as his agent or agents for such purpose if he deem it best, paying him or them such reasonable allowance therefor as may be agreed upon, and to supply the said agent or agents with such goods and merchandise as may be requisite for such purpose.

“Provided, that the said trustee shall not, by anything herein contained, become in any way liable for the said debts or for losses in the said business in any other way, except for distribution of the moneys which shall come to his hands hereunder as hereby required.”

It was recited that the assignor's business was that of harness-maker. The evidence shewed that he also made trunks, and that at the date of the assignment there were saddles, harness, and trunks unfinished, and requiring to be finished to be marketable.

The expressions, “to dispose of the said business,” and “to carry on the same,” are those of the printed form. As applied to the subject matter of this assignment, they would seem to refer only to selling the chattels, and to having done upon them whatever was required to make them fit for sale. At least there is nothing before us to indicate that the business of this tradesman was of a character which made its maintenance as a going concern of any consequence, or that anything would be gained by attempting to sell it as a going business.

I do not know that anything turns on this.

The point made is, that the trustee had power under the terms of the trust to delay unreasonably the distribution of the estate, and even to employ the assets for other purposes than the payment of the debts, namely for the carrying on of the business, and that the existence of this power in the trustee vitiates the assignment.

The learned Judge acceded to that contention, considering that to be the effect of the statute as interpreted by decisions of the Courts.

We must, in discussing the appeal from that judgment, bear in mind that the argument is, that the existence in



the assignment of the clause in question operates in its legal effect, or by reason of some intention which must necessarily be inferred from the terms of the clause, to vitiate the deed; for it is not contended that there is any other evidence that its insertion was dictated by a desire that the trustee should do anything that would not be for the advantage of the creditors generally, or by any fraudulent motive.

The first inquiry is, was the assignment made with intent to defeat or delay the creditors, or to give one or more of the creditors a preference over the other creditors?

If it was not made with any such intent, *cadit quæstio*, but if it was, then the question has to be answered: Was it made and executed for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors their just debts?

If this second question is answered in the affirmative, the assignment will not be avoided by the statute.

I think the two questions have to be answered separately, and in the order in which I have put them. I take the same view of the effect of the statute in this respect as that expressed by the present Chief Justice of the Queen's Bench in *Gottwalls v. Mulholland*, 15 C. P. at pp. 71, 72.

I am not prepared, however, to assent, without reservation, to the opinion intimated by the same learned Judge in the same case (at p. 67), and which had also been expressed soon after the passing of the Act 22 Vict. cap. 96 (the 19th section of which is now the 2nd section of R. S. O. cap. 118,) by Esten, V. C., in *Metcalfe v. Keefer*, 8 Gr. at p. 394, that our statute had not altered the law enacted by 13 Eliz. cap. 5, except by avoiding preferential assignments. It is true that the terms of section 2 may be essentially like those of the English statute so far as they declare void any transfer made with intent to defeat or delay creditors; but while under the decisions of which *Wood v. Dixie*, 7 Q. B. 892, is usually regarded as the leading one, a transfer, one motive of which was to delay creditors, or even to defeat them, might be upheld by rea-

son of the character of the consideration or the intention really to pass the property, our statute, by the saving clause, indicates that the Legislature by which it was passed intended every such transfer to be avoided by the motive to defeat or delay, except only when made for the benefit of all creditors equally. It declares in effect that in two cases there may be a purpose to delay all creditors, and even partially to defeat some of them, without vitiating the transfer, those cases being *first* when the purpose is to pay all creditors *pari passu*, and *secondly*, when a sale of goods is made *bonâ fide*, in the ordinary course of trade or calling, to an innocent purchaser.

The first of these saving clauses is not very applicable or necessary in the case of transfers made with intent to prefer. To apply it to them would be to read the statute as declaring that all transfers made with intent to prefer one creditor should be void, except those by which all creditors were put on equal terms. There is no incongruity in reading it with the other branch of the prohibition, and as saying that all transfers made with intent to delay one or more creditors shall be void, except those intended for the benefit of all creditors alike.

Having regard to this consideration, and noting also the fact that our statute differs from that of Elizabeth by dealing only with acts done by insolvent persons, I think there are sufficient reasons for not, as of course, recognizing the English decisions as infallible guides to the true interpretation of our statute.

But all such questions are really set at rest by the law passed in 1872 as 35 Vict. cap. 11, and now R. S. O. cap. 95, s. 13, by which the true construction of the Statute of Elizabeth is declared, and which necessarily governs the statute we are considering so far as its construction may be supposed to depend on its resemblance to the other.

We then inquire in what respect the assignment before us offends against the prohibitory enactments of the statute. It does not profess to prefer any creditor. It professes to put them all on the same footing, and it really does so. It

is equally true that it does delay and is intended to delay the plaintiff, and also to defeat a portion of his claim in case there does not happen to be enough to pay every one in full. The question, therefore, under the statute, and the only question, is, whether or not it is made for the purpose of paying all the creditors ratably and proportionably, and without preference or priority. That purpose is undoubtedly the ostensible one. If we are to say that that is not the real purpose, we can only say so as an inference of fact, not as a conclusion of law; and, as I have before remarked, we have no evidence upon that issue of fact beyond what may appear on the face of the deed. Evidence of sufficient cogency may be furnished by provisions cognate or seemingly cognate to those now relied on, if they are unreasonable or extravagant. An instance of this occurred many years ago in the case of *Hendry v. Harty*, 9 C. P. 520, where the assignment authorized the trustees, before paying any of the debts, to pay all advances in goods, moneys, or otherwise, if any, which they should make in and for the assignor's trade or business, in conducting the same in the winding-up thereof to the best advantage, which the deed authorized them to make; and in the next place to retain *ten per cent. of all moneys received* in the execution of the trusts for their remuneration. The validity of that assignment was treated as depending on a finding of fact. Draper, C. J., delivering the judgment of the Court, pointed out the facilities for fraud which these trusts afforded, and referred to the circumstance that the assignor was to remain, pending the "winding-up," in possession, conducting the business at a salary, the amount of which was in the discretion of the trustee, and said: "Considering all the circumstances stated, as it is left to us to draw inferences therefrom, it appears to me that two objections to the assignment are well established:—1st. An indefinite delay, and the possible entire defeat of all the creditors except the trustees thereby. 2nd. An undue preference to the trustees, as creditors, over all other creditors."

In *Metcalf v. Keefer*, 8 Gr. at p. 398, Esten, V. C., remarked: "It may be, however, that although no such result arises" (alluding to the question of the creditors becoming liable as partners with the trustee) "the trusts are of such a nature as to cause unreasonable delay in the distribution of the estate, and creditors are thereby directly delayed, and also justified in reason in declining to execute the deed, and thereby, if the deed be upheld, indirectly hindered. There is no doubt that, in all cases of this sort, some restrictions and delays are imposed upon the creditors, and nevertheless the deeds are upheld as tending to the general good of all. But it would not be difficult to imagine a case in which the distribution of the estate might be postponed for such a length of time, and so unreasonably, that the Courts would be compelled to infer an intent to delay and hinder creditors. Such a deed would doubtless be void against them. Thus we have seen that a provision for the winding-up of the estate of the debtor, although it necessarily involves some delay and restriction, is held good, because it tends to the general benefit of all the creditors."

In *Gottwalls v. Mulholland*, 15 C. P. 62, 3 E. & A. 194, the transfer upheld was a sale by the debtors of their goods for which they took notes at one, two, three and four years, intending those notes to be applied in payment of their creditors. The jury had pronounced in favor of the *bona fides* of the transaction, and full effect was given to that finding. I refer to the case only as an authority for the position that a transfer is not vitiated, in all cases, by reason of the payment, which is ultimately to be shared by all the creditors, being by the act of the debtor deferred for a period which to the creditors may perhaps seem unreasonably long.

The circumstance of the winding-up of the debtor's affairs being postponed by the terms of the trusts, which are dictated by the debtor, is certainly an important fact in evidence. It existed in the case of *Cornwall v. Gault*, 23 U. C. R. 46, and, together with other features, understood



to resemble those in *Hendry v. Harty*, was held to vitiate the deed. But the question was, as in the other cases, treated as one of fact. The judgment of the Court, delivered by Morrison, J., concludes thus: "Considering all the circumstances of this case, and as we are left to draw inferences like a jury, we are of opinion that the assignment was not honestly or *bonâ fide* made; that it was a mere device, made with the object and intent of delaying and defeating Ketchum's creditors; and that the verdict should be entered for the defendants."

In *Thorne v. Torrance*, 16 C. P. 445, 18 C. P. 29, there were questions discussed under the Insolvent Act of 1864 as well as under the law we are now considering, which was then C. S. U. C. ch. 26, sec. 18. The deed of assignment there in question contained a clause essentially similar to that on which the present discussion is raised, but that was not the only one relied on as invalidating it. The parties of the third part (or *cestuis que trustent*) were described as the several persons, other than the trustee, who was himself a creditor and who was the party of the second part, creditors of the assignors, whose names were set forth in a schedule marked C. The trustee was to get in all the debts, and sell and convert into money "all such and so much of the said estate and effects as should not be necessary to be kept unsold for the purpose of enabling the trustee to carry on the said trade or business in winding it up to the best advantage." Then there was the clause that resembled the one before us; and the trustee "was to pay, retain, and satisfy ratably and proportionably, and without any preference or priority to themselves, the trustee and the several other persons parties thereto of the third party, the several debts or sums set opposite to their respective names in the schedule annexed marked C." There had been two assignments, one made on the 1st June, and another on the 5th June, which was intended to supersede and revoke the first. On 1st July Torrance, the defendant, obtained an attachment in insolvency against the debtors, having, after the assignments,



and some time in June, obtained judgment and execution against them. The ultimate decision was that the assignments, being acts of insolvency, were destroyed by the attachment in insolvency; and the *fi. fa.* being in the hands of the sheriff to be executed before the attachment, the defendant gained and retained priority over the other creditors. The final disposition of the case, therefore, did not turn on the effect upon the assignments of the statute now in question. It was nevertheless discussed both in the Court of Common Pleas and also in the Court of Error and Appeal.

In the Common Pleas, Richards, C. J., considered the assignment void under the statute for two reasons. One was, the restriction of the trusts to the payment of the scheduled creditors. He thought that the reasonable rule in relation to an instrument so framed was that those who set it up must shew that it embraced all the creditors, before it could be considered a valid assignment under the statute.

It was shewn that a debt was owed by the insolvent to his solicitors who were not named in the schedule, and it was understood by the Chief Justice, as he states, that the guardian's list of creditors in the insolvency proceedings contained the names of some others not mentioned in the schedule. The other reason was, that the trustee was set down as a creditor for upwards of \$47,000 while the true debt was under \$34,000. The jury found that the larger amount had not been inserted fraudulently; but the Chief Justice considered that a preference was created, and, if I understand his judgment correctly, intentionally created. "In the way these assignments are framed," he said, after a careful discussion of the matter, "the creditors are to be paid the several debts or sums set opposite their respective names in the schedule, shewing a desire to have the sums paid as debts." John Wilson, J., gave no separate opinion as to the effect of the statute upon the assignments and Adam Wilson, J., contented himself with saying that he was not able to say that the deed was fraudulent against

creditors; that the Insolvency Act no doubt enabled it to be avoided; but that unless in that respect, and to that extent, there was nothing else in his opinion which impeached it.

The case was heard in appeal before the same learned Judges who gave judgment below, with the addition of Draper, C.J., Vankoughnet, C., Hagarty, J., and Mowat, V.C.

The majority of the Court held that as the question of property at the time of the delivery of the writ to the sheriff was all that was in issue, the question arising in interpleader, they were not at liberty to consider whether Torrance, the creditor who had instituted the insolvency proceedings, ought not to be confined to his remedy in insolvency, in place of being permitted to assert his execution against the assignee.

In that view of the case it was unnecessary to discuss the assignments, and that topic is therefore not touched by the judgment delivered by the Chancellor, which was that of the majority.

Hagarty and A. Wilson, JJ., and Mowat, V. C., dissented. A. Wilson, J., discussed the subject of the assignment at length, giving reasons of great force, and not unsupported by authority, for construing the deed as not excluding any creditor, notwithstanding the expressions referring to the payment of those named in the schedule. It would be aside from my present purpose to follow the learned argument by which he supported his view. Hagarty, J., concurred with A. Wilson, J.; and Mowat, V. C., merely remarked as to the second assignment that he thought it was valid as it appeared to name all the creditors except the attorneys who drew the assignment, and who chose to exclude from it the debt due to themselves.

I think we have in the opinions of these three eminent Judges high authority for hesitating before we infer an intention to prefer one creditor or exclude another from the mere fact that a deed happens to contain some provision not so carefully framed as to make inequalities impossible.

The cases of the class of *Bank of Toronto v. McDougall*,

15 C. P. 475, in which assignments have been held valid by which some creditor has been preferred, because the preference has been obtained by pressure, may have correctly or incorrectly applied the doctrine of pressure, but they are at all events recognitions of the effect of the statute as making the validity of the deed depend on the motive, and not on the mere fact of a preference being obtained.

In referring, as I have now been doing, to the course of decision in our Courts, for the purpose of shewing how uniformly the construction put upon the statute has been, as making the fact of the intent which vitiates an assignment one to be found as a jury would find a fact, from the conviction produced upon the mind by the evidence, and not something to be deduced by the application of a rigid rule of law to certain forms of words, I have probably dwelt upon the cases at unnecessary length, because the principle that runs through them all, and that on which this appeal should, in my judgment, be decided, is that which we acted upon in *Badenach v. Slater*, 8 A. R. 402. It is succinctly expressed in the passage which the learned Judge has quoted from the judgment of the late Chief Justice of Ontario, when he said: "The whole of the clause must be read together; and where an intent to defeat or delay creditors is evidenced by the assignment, it must, I apprehend, be adjudged fraudulent and void, although it provides for the payment ratably and proportionably of all creditors without preference or priority. The fraudulent intent will vitiate in the one case, while the honest purpose will support the instrument in the other." And although we have not yet in the reports of the Supreme Court the judgments delivered there, I believe, from having had an opportunity of reading an unofficial report of them, that we shall find the principle very clearly enunciated by more than one of the learned Judges (a).

I am unable to see in the clause on which the question

(a) The judgment was affirmed by the Supreme Court.

is now raised any reasonable ground for considering that the purpose of the assignment was not what it professes to be, the payment of the creditors ratably and proportionately and without preference or priority.

The clause is not so framed as to be very well fitted to the circumstances of this estate; and that is accounted for by the use of the stationer's form. It is nevertheless a safe and just rule that a person executing a deed, whether he has it prepared for the purpose or chooses for the sake of economy or convenience to use a printed form, must be held to intend to do just what it does. That is a rule of evidence, and it is as a rule of evidence that it is applied in *Mills v. Kerr* 7 A. R. 769, to which the learned Judge refers. It of course applies here; but when we hold in accordance with it, that the assignor intended to give the trustee the full powers expressed in the clause, the argument is not thereby affected.

We take the whole deed together. We have an assignment for the purpose of the trustee converting into money the stock of a manufacturer of and dealer in harness, &c. It is not contended that the duty of the trustee acting under a simple conveyance for the benefit of creditors containing no specific directions, would be to bring the stock instantly to the hammer. He would be bound to use some discretion as to the time and mode of sale. The express power now in discussion, if not one which the trustee would have by implication, is obviously one which it may be important in the interest of the creditors that he should exercise.

It is argued, however, that it may be abused, and the learned Judge appears to have thought that the act of the debtor, in vesting such a power in a trustee whom it might possibly be difficult effectively to control by legal process was not compatible with fair dealing.

A scruple of that sort may be answered by reference to the doctrines laid down in cases like *Janes v. Whitbread*, 11 C. B. 406, and *Boldero v. London and Westminster Discount Co.*, 5 Ex. D. 47, as well as in some of the decisions

in our own Courts to which I have referred; but the question remains the same: What was the motive of the transfer?

The English cases are useful as shewing that it is not our duty to infer an improper intent or motive from the existence of such a power in a deed of this kind.

If I do not misunderstand the views expressed by the learned Judge in the Court below, he bases his conclusion rather upon what he takes to be the legal consequence of inserting the power in the deed, than upon any inference of fact adverse to the expressed purpose of the assignment.

I think no such inference could properly be drawn; but that we should regard the clause as intended only to enable the trustee to do, without personal risk to himself, whatever he may consider best calculated to realize the assets to the best advantage, and the assignment as executed for the purpose of paying the creditors ratably and without preference or priority; and that we should therefore allow the appeal, with costs.

*Appeal allowed, with costs.*—HAGARTY, C. J. O., dissenting.



## VOGEL v. THE GRAND TRUNK RAILWAY COMPANY.

## MORTON v. THE SAME COMPANY.

*Railways—Railway Acts—Liability of company for damage.*

The Railway Act of 1879, 42 Vict. ch. 29 (D.), removed the Grand Trunk Railway Company from the operation of the General Railway Act of the Dominion, to which it had been for a short time subject under the provisions of the Act of 1875.

The Act of 1879 repealed all the previous Acts of the Dominion in reference to railways, but by section 100 recited that certain enactments, including those contained in sub-sec. 4 of sec. 25 (which were the same as sub. sec. 4 of section 20, 1868), had been declared by the Act of 1875 to apply to all railways within the jurisdiction of the Parliament of Canada, and then enacted that they should so apply accordingly. Sub-section 4 declares that any party aggrieved "by any neglect or refusal in the premises" shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage has arisen from any negligence or omission of the company, or of its servants. It was held in the Court below (2 O. R. 197) that the premises must be taken to refer to the sections to be found in the repealed Acts.

Held, by BURTON and PATTERSON, JJ.A., that no such construction could be given to the words; but as the Grand Trunk Railway was, and always had been, subject to the General Act of the old Province of Canada (1851) which contained a provision similar to that in section 20, sub-sections 2 and 3, without sub-section 4; the effect of the enactment that that sub-section should apply to all railways extended the restriction to the similar sections in the Act of 1851, and effect could thus be given to the words used.

Per MORRISON and OSLER, JJ.A., that the construction adopted by the Court below was admissible, but that at all events, as the provisions of the Railway Act (C. S. C. ch. 66) corresponding to section 20, sub-sections 2 and 3 of 42 Vict. ch. 29, were made applicable to the defendants, effect could in this way be given to the language of section 100. The plaintiff shipped a car load of horses on the defendants' railway, for the purpose of being carried thereon. The shipping bill had indorsed on it the following, amongst other, conditions:

"The owner of animals UNDERTAKES all risks of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, or otherwise howsoever, no matter how caused." By the negligence of the servants of the defendants some of the horses were killed.

Held, by BURTON, J. A., that the company was not precluded by the terms of the Act of Parliament from making a special contract exempting themselves from liability even in case of negligence on their part. By BURTON and PATTERSON, JJ. A., that the transaction was not within the statute, being in fact the hiring of a car, and not a neglect or refusal to perform any of the obligations cast upon the company by the statute.

Per MORRISON and OSLER, JJ. A., affirming the judgment of the Court below, that the company could not, by any special contract, relieve themselves from liability for negligence.

Per PATTERSON, J. A.—The legislation of the Dominion Parliament forbidding the defendants contracting against liability for their own negligence is not *ultra vires*.

Quære, as to the effect of the words "neglect or refusal" in the sections in question.

THESE were two appeals from the Queen's Bench Division, which Court had in *Vogel's Case* set aside a verdict entered at the trial for the defendants, and directed judgment to be entered for the plaintiff for \$725, and in *Morton's Case* had refused to set aside a verdict for the plaintiff entered at the trial for \$361.39. In the latter case special leave to appeal had been granted by this Court.

The plaintiff had in each case shipped by the defendants' railway a number of horses to be carried on the railway ; in *Vogel's Case* from Belleville to Prescott, in *Morgan's Case* from Kingston to Brandon in Manitoba, together with certain settler's effects also shipped by Morton.

It was alleged that in each case, through the negligence of the servants of the defendants, the trains upon which these consignments were being carried collided with other trains, and some of the horses were killed, and all of them more or less injured ; and the other effects of Morton greatly damaged.

In the shipping note in *Vogel's Case* signed by Walter Fanning, the consignor, under the heading, "NO. OF PACKAGES AND SPECIES OF GOODS." There was written "1 Car horses." "O. RISK," meaning owner's risk.

Amongst the general notices and conditions of carriage indorsed on the shipping note in each case was the following:

"The owner of animals UNDERTAKES all risks of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, or otherwise howsoever, no matter how caused."

The other facts appear in the report of the case in the Court below, 2 O. R. 197, and the present judgment.

The appeal came on to be argued before this Court on the 16th of June, 1884.\*

*Bethune*, Q. C., and *Osler*, Q. C., for the appellants. The defendants in the case were relieved from liability in respect of the horses placed on board the cars of the com-

\*Present: BURTON, PATTERSON, MORRISON, and OSLER, JJ.A.

pany, they having been so delivered to the company upon the terms and conditions expressed in the special contract stated in the evidence between the consignor and the company. It is true the plaintiff sought to make the company liable in their character of common carriers, and not upon the special contract set out, although such special contract was clearly established by the evidence adduced on the trial. If the plaintiff now seeks to rely upon such special contract, the terms thereof prevent his recovering, as by such contract he assumed all the hazard and risk attendant on the transportation, whatever may have given rise to the injury. Here the company merely furnished for the use of the plaintiff a car to be loaded by him, which the plaintiff loaded; the defendants agreeing to haul such car to the place of delivery at a reduced rate for transportation, the plaintiff agreeing expressly to assume all risk of casualties, though caused by the negligence, or other improper conduct of the servants of the company. The evidence shews that the rate charged the plaintiff was much less than what would have been demanded if the company had been required to convey the horses as common carriers. In effect, the plaintiff would contend that the several acts passed in relation to the powers and liabilities of railways, have deprived the owner of goods from entering into any contract exempting the railway company from liability, and assuming the same himself: *Great Western R. W. Co. v. Morville*, 21 L. J., Q. B. 319; *Walker v. York and North Midland R. W. Co.*, 2 E. & B. 750; *York and North Midland R. W. Co., v. Crisp*, 14 C. B. 527; *Browne on Carriers* 165.

*G. D. Dickson*, Q. C., for *Vogel*, and *Ermatinger*, for *Morton*, on behalf of the respondents, contended that the jury having found that the horses were not carried under the alleged special contract the company could not now set that up as a defence to the claim of the plaintiff: that the company, being common carriers, could not exempt themselves from liability for loss occasioned through the negligence of the company or their servants,

and any condition intended to so exempt it would be void. *Peek v. The North Staffordshire R. W. Co.*, 10 H. L. Cas. 473; *Martin v. The Great Indian Peninsular R. W. Co.*, L. R. 3 Ex. 9; *Ohrloff v. Briscall*, L. R. 1 P. C. 231; *Phillips v. Clark*, 2 C. B. N. S. 156; *D'Arc v. London & North Western R. W. Co.*, L. R. 9 C. P. 325.

Sep. 5, 1884. BURTON, J. A.—The General Railway Act of 1868, was held, and I have no doubt properly held, not to apply to railway companies like the Great Western and the Grand Trunk, and I do not think they were affected, in so far as the sections now in question, sub-secs. 2, 3 and 4 of sec. 20, are concerned, by the amended Act of 1871. That Act, *inter alia*, amended sub-sec. 4 by adding the words which have given rise to the present discussion, viz., “from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or its servants.”

It is true, it is declared that the provisions of that Act shall apply to every railway company theretofore or which might thereafter be incorporated, and to every railway theretofore constructed or then in course of construction, as well as to those railways to which the Railway Act of 1868 is by its provisions declared to be applicable.

The Act, in fact, was for providing greater facilities than then existed for the acquisition of station grounds, and also to amend in a certain particular the Railway Act of 1868; but it did not profess to extend the Railway Act or any of its provisions to this railway, but made the new enactment, as regards the acquisition of the increased accommodation required, applicable to all railways to which the legislative authority of the Dominion extended.

But by the Act of 1875, 38 Vic. ch. 24, sec. 20, as so amended by the Act of 1871, is made to apply to every railway subject to the Jurisdiction of the Parliament of the Dominion, and extended therefore beyond all question to this company; and then comes the Consolidated Railway Act of 1879, which repeals the Railway



Act of 1868, the Railway Act of 1871, and the Act of 1875, and which, whilst re-enacting *ipsissimis verbis*, subsecs. 2, 3 and 4 of the original sec. 20 in the Act of 1868 as amended (now s. 25 of the new Act), confines those sections to railways constructed or to be constructed under the authority of any Act passed by the Parliament of Canada; and then, after declaring that the enactment contained in sub-sec. 4 of sec. 25 of this Act (instead of saying of sec. 20 of the old Act, of which this sec. 25 is a transcript) was declared by the Act of 1875 to apply to every railway incorporated or to be incorporated, and subject to the jurisdiction of the Parliament of Canada, enacts that it shall so apply accordingly.

The 102nd sec. declares that the Acts referred to are repealed and that Act substituted for them, and then contains provisions, which are probably inserted unnecessarily, for preventing the repeal of the Act in question reviving previous enactments which they had repealed, providing for the continuation of proceedings lawfully commenced under the former Acts under the corresponding provisions of this Act, which is not to be considered as a new law but as a consolidation and continuation of the said repealed Acts, subject to the amendments and new provisions hereby made and incorporated with them.

The effect then of the Act of 1879 was to remove the Grand Trunk Railway from the operation of the General Railway Act of the Dominion, to which it was never subject except by the provisions of the Act of 1875, and the reason for extending sub-sec. 4 alone to it is probably explainable on the grounds I shall presently refer to, and but for which I should have found it impossible to say that any effect could be given to it, for I cannot agree with the Court below that we should be at liberty to import into the statute words not found there, merely from the circumstance that a reference is made to "the premises." All that could be said would be that the Legislature had not expressed what it intended, *quod voluit non dixit*; and therefore, if this was the actual position of matters, I should agree with the



learned Chief Justice of the Common Pleas that the legislation was so defective as to make it impossible for us to give any effect to it (a).

But the Court below, as well as the learned counsel, have omitted to notice that although the General Railway Act of the Dominion does not apply to this company, the General Railway Act of the former Province of Canada, so far as its provisions are incorporated with their charter, does apply, and the 96th, 97th and 98th sections of that Act are similar in terms to sub-secs. 2, 3 and 4 of sec. 20 of the Act as it stood originally ; so that, when, by the Act of 1875, the Legislature made sec. 20 and its sub-sections named apply to the defendants' company, it made no change in their liability, except as it was affected by the amendment to sub-sec. 4 ; and when they subsequently repealed the Act

(a) The judgment delivered by the Chief Justice of the Common Pleas, at the trial, was as follows :—

After hearing a pretty long argument in this case, I give my opinion as follows :—

I pass over the Acts of 1868 and 1871, because it was decided they did not extend to the defendants, and begin with the Act of 1875, which, it is admitted, did extend to them, by sec. 4 of that Act (38 Vic., ch. 24, Dom.), making *The Railway Act*, 1868, sec. 20, as amended by the Act of 1871, 34 Vic. ch. 43, sec. 5, applicable to all Railway Companies.

The Railway Act, 1868, sec. 20, sub-sec. 2, provides that trains shall be started and run at regular hours, &c., and sufficient accommodation shall be furnished for transportation of all passengers and goods ; and sub-sec. 3, "such passengers and goods shall be taken, transported, and discharged at, from, and to such places, on the due payment," &c. Sub-sec. 4, "The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the Company," and by the Act of 1871, sec. 5, the following words were added at the end of sub-sec. 4 : "From which action the Company shall not be relieved by any notice, condition, or declaration, if the damage arise from any negligence or omission of the Company, or of its servants." So far, the defendants are within this Act.

The Consolidated Railway Act, 1879, sec. 2, makes the sections 5 to 34, both inclusive, of that Act apply to the "Intercolonial Railway, constructed under the authority of the Act of the Parliament of Canada, passed," &c. Sub-sec. 2, "The said sections shall also apply to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada," &c.

Here the argument on the part of the defendants is, that "the Parlia-

of 1875, but after a recital that sub-sec. 4 had been declared to apply to every railway, re-enacted that it should still apply accordingly, that is, as it had applied when that Act was in force, though not a very clear or artistic mode of legislating, it may very fairly be read as applying the restrictive portion of the sub-section to the similar enactments in the General Railway Act of the old Province.

Then what is the effect of the language used? As the sections stood originally, they seemed to add little, if anything, to the company's common law duty as common carriers, but gave a statutory remedy to a party aggrieved by any neglect or refusal to comply with their requirements;

*ment of Canada*" is language applicable only to the Parliament of the Dominion of Canada.

And on the part of the plaintiff, that it applies not only to Acts of the *Dominion*, but also to Acts passed by the Parliament of the *Province* of Canada, because Acts passed by the latter authority were and are Acts passed by the *Parliament of Canada*, and that the legislation of that Province was legislation of the Parliament of that Province; and the Legislature of that Province was known as and was called the *Parliament of Canada*.

Mr. Bell referred to 44 Vic., ch. 24, sec. 4, and to sec. 59 of Consolidated Railway Act of 1879, also sec. 29 of same Act, where, since Confederation, the *Parliament of the late Province of Canada* is so described, and not by the name of the Parliament of Canada

I think the "*Parliament of Canada*," unless the Statute shews that the Parliament of the late Province of Canada is referred to, must refer to the Parliament of the Dominion of Canada, and I think so for this reason. Suppose the Dominion Parliament passed an Act enacting that all Banks established under any Act of the "*Parliament of Canada*," should have certain powers and privileges; the effect of that would be, if the "*Parliament of Canada*" applied as well to the *Province* of Canada, as to the *Dominion* of Canada, to give to Banks established by statute prior to the act of confederation, and as far back as their act of incorporation, or as the Union of Upper and Lower Canada, such powers, &c., while Nova Scotia, &c., Banks would have such powers only from the time of the passing of the Dominion Act, and such a construction of the words, the "*Parliament of Canada*" would manifestly not be a proper construction of such words. I think, then, in the Act of 1879, sec. 2, the "*Parliament of Canada*" means the Parliament of the *Dominion* of Canada and not of the *Province* of Canada.

Mr. Dickson, for the plaintiff, contended that by sec. 102, the Act was not to be "construed as a new law, but as a consolidation and continuation

but the sub-section as amended adds the words I have quoted above, "from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants."

The language, read in connection with the previous portion of the section, is not very intelligible. That portion gave an action to the party aggrieved by any *neglect* or *refusal* of the company to start trains at the advertised hours with sufficient accommodation for the transport of passengers or goods as are offered for transportation at the place of starting and at usual stopping places, and for refusal

of the said repealed acts, subject to the amendments and new provisions hereby made and incorporated with them."

I am not satisfied the provision is not limited only to what goes before it, or to anything done, &c., under the repealed acts, and I will not, as at present advised, give effect to Mr. Dickson's argument. If that be so, and I think it is, it may explain why sec. 4 of the Act of 1881, (44 Vict. ch. 24, Dom.) was passed, (see also sec. 29 of the Act of 1879), and that is to include the Grand Trunk, and other railway companies which had not been constructed under the authority of the Act of the Parliament of Canada,—that is, of the *Dominion*—and so were not within the operation of the Act of 1879, sec. 2, sub-sec. 2.

I think the defendants are not within the operation of the Act of 1879, sec. 25, sub-secs. 2, 3, 4, the same as the corresponding sections in the Act of 1875, which did apply to and bind the defendants.

Then, as to the defendants being liable, notwithstanding their conditions, according to the authorities cited by Mr. Dickson, because this accident arose from their own admitted negligence. I shall decide that formally against the plaintiff, because our decisions referred to have given effect to similar conditions in like cases to the present, and the plaintiff should raise the question for the consideration and decision of the Court. I have no positive opinion upon this point, either way, at present. There is the rule that parties may contract as they please, and on the other hand such Companies should not be allowed to contract themselves out of all responsibility for their defaults.

Here, the property carried was live stock, which perhaps may be the subject, properly enough, of stringent conditions; and again, the owner himself was put expressly in charge of them and given a free pass, on condition of not looking to the Company for damages, in case of loss of or injury to, his stock, even by their own negligence. I shall decide the law for the defendants at present, and assess the damages, so that the Court can deal with the whole case, and there will be no new trial.

or neglect to take, transport, and discharge them at, from, or to such places on due payment of the toll, freight, or fare legally authorized therefor; and it is for this neglect or refusal that the action lies.

It is very widely different from that of the English Act, which declares that every company shall be liable for the loss of, or any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding or delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability.

If the action is founded on the statute, it is confined to damages resulting from a refusal or neglect to do one or other of the matters referred to; and speaking for myself, I should have thought that an action on the statute would not lie where the loss was occasioned, not by any *neglect* or *refusal* by the company to do the act, but by an accident after they had complied with the statutory requirements, even though the accident was attributable to the negligence of the company or its servants; in other words, "neglect" and "refusal" are not to be construed as synonymous with "negligence and default."

I can hardly believe that if a specific penalty had been given payable to a party suing, that he could have recovered under this statute as it stood originally without proof of intentional neglect or refusal on the part of the company; but it may perhaps be said that whatever construction the Court might have been compelled to place upon these words originally, the Legislature have, by the addition of the sub-section in question, indicated their meaning; and as some of my learned brothers take that view, I shall deal with it as if it were intended to extend to failure to deliver by reason of negligence.

What then is the meaning properly attributable to the words used?

We cannot of course shut our eyes to the fact that rail-



way companies have become masters of the situation, and have not been slow to avail themselves of their position to introduce stipulations or conditions of immunity, not only against liability in respect of loss or injury arising from circumstances beyond their control, but also against liability in respect of loss or injury resulting from their own negligence, however gross and inexcusable.

It is, I think, also equally clear that the law of England bore with undue severity upon persons or corporations filling the position of common carriers. It was not surprising, therefore to find them at a very early day seeking to limit their liability by notices and conditions stating the terms on which they were prepared to carry goods, and limiting their responsibility.

It was for a time doubted whether they could thus limit their liability, but it eventually became perfectly settled that they had this power; but in order to make such notice effectual, it was necessary to bring the knowledge of it home to the particular customer. That they could however, by notice exempt themselves from liability, however caused, is quite clear upon the decided cases, and led in England to the passage of the Carriers' Act, and subsequently of the Railway and Canal Traffic Act,

The effect of the sections we are now considering is undoubtedly to place it out of the power of railway companies, in cases coming within them, to exempt themselves by notice, condition, or declaration, from liability where the damage arises from the negligence of the company or its servants; and it seems to me that nothing can be more reasonable than such a provision. But could it have been intended by this language to deprive parties of the power of entering into a special contract, where such parties clearly understand the nature of the agreement and are desirous of entering into it?

Take the case of a person desiring to send a valuable race-horse by a railway. The horse is of the value of several thousand dollars, and the owner is desirous of having it carried to a place where races are being held. The com-



pany, aware of the value of the animal, not unreasonably refuse to incur so heavy a risk for the ordinary fare chargeable for horses. To the owner it may be a matter of great moment to have his horse carried at once, and he may be quite willing, under the circumstances, to assume the risk, or may have insured the animal with an insurance company. Is it to be said that, under the language of this Act, he is precluded from making such an arrangement? With great deference, I think we should hesitate before placing such a construction upon it, and debar persons from knowingly and voluntarily making bargains for themselves.

As I read this section, the words used mean pretty much the same thing. I do not attach the importance to the word "condition" that was given to it on the argument, whether the word be notice, condition. or declaration, or all together; they mean practically the same thing—"*the terms published by the company of their own act and will on which they are willing to carry goods.*" If the customer has notice of these he is bound by them, but the statute now says he shall not be bound by any notice of that kind where the injury results from negligence; but what is there in this language to prevent a person deliberately making a contract to assume that risk? Of course, his free assent is necessary to the validity of such a contract.

It may be said that the owner of goods is in the power of the railway company, and has no more option in signing a contract of this description than he has as to accepting a ticket.

If the evidence disclosed that the contract was forced upon a party under circumstances which left him no option, or where he had no opportunity of seeing or reading the document, the jury would no doubt relieve him by holding that the goods were not carried upon the contract. But in the absence of any fraud, coercion or imposition, it is difficult to see how parties are precluded under this Act from making a special contract.

If the Legislature deem it desirable they might still re-

quire, as in England, that the conditions of such a contract should be liable to be declared invalid by the Courts, if in their opinion they were unjust or unreasonable.

It seems to me that the public are amply protected by the enactment in question. The company cannot by any act of their own exempt themselves from liability for negligence of themselves or their servants.

They may at their own risk refuse to carry certain things, such as the race-horse I have instanced, and may possibly render themselves liable to an action for not carrying, if the fare or toll legally payable for its carriage be tendered, but I see nothing which should be construed as prohibiting them from making a special contract with any one competent and willing to enter into such a contract.

There may unquestionably be cases in which, although a party may sign a shipping bill, it may be under such circumstances of pressure or coercion as to deprive the transaction of the character of a free contract on the part of the shipper, leaving him in the same position as an ordinary person who ships with notice of the company's conditions, with the only difference that he has admitted notice.

I am not prepared to say that since the passing of the Act the mere signing by the owner of the goods of a shipping bill or receipt containing conditions which restrict the liability of the company even in cases of negligence, would necessarily shew an assent to its terms so as to constitute a special contract. It might well be that the signing might be under such circumstances as to amount to nothing more than an admission in writing that the owner had notice of the conditions on which the company professed to carry, and it would be a question for the jury in every case whether a special contract existed or not.

I can well understand that, as in the case of *Walker v. York and North Midland R. W. Co.*, 2 E. & B. 750, if a notice were sent to a person offering to carry a certain class of goods at a reduced rate of freight, but that in that case the company would expect to be relieved of all liability, and the person thus notified chose to send his goods at those

reduced rates, although he persisted at the time of sending them that he intended to hold the company liable, unless it were shewn not only that he unambiguously dissented from the terms and the company acquiesced in his dissent, the jury might and ought to infer that they were sent on a special contract.

I think that the onus is upon the company to shew that the goods were carried on a special contract, and that that onus is not satisfied by the mere production of a writing over the signature of the owner, that the goods were carried on the conditions named by the company.

If it appear that the price of freight was made lower in consideration of such special restriction, and the owner has received the benefit of such reduction, such fact would furnish evidence from which a jury might infer assent; but if no optional tariff of prices of which the owner can avail himself is shewn to exist, little or no inference of assent to special terms can be drawn without in effect allowing the company to limit their liability by a notice.

The learned Chief Justice has referred to the case of *Brown v. The Manchester Railway*, (Law Times for December 23rd, 1882, p. 146.) The question that arose there was, whether, under the statute, the conditions of the special contract were just and reasonable, and the learned Judge refers to the strictness with which such contracts are construed; but that case has since been overruled in the House of Lords, 8 App. Cas. 703, and the more sensible rule adopted that the parties concerned are usually the best judges of the reasonableness of their own contracts, and strong opinions are there expressed as to the undesirability of legislative interference in such matters.

I am not prepared to say that if this case turned upon the question of special contract, we should be in a position to deal with it on the qualified findings of the jury (a), with-

(a) The findings of the jury were as follow:—

1. Were the plaintiff's horses carried under the special contract or not? No. Unless so far as this answer is qualified by our answer to the third question.

out a further inquiry ; but as I am of opinion that, upon the ground more fully referred to by my brother Patterson, the plaintiff cannot recover, I have not thought it necessary to consider that point further.

Sub-section 4 gives an action to the party aggrieved by any breach of the duties previously enumerated, amongst which is the duty imposed upon the company to take, transport, and discharge at, from and to their stations on payment of the toll, freight or fare, payable for such goods.

It is in reference to such an action, that is, an action founded on the statute, that the sub-section provides that the company shall not be relieved by any notice, condition, or declaration if the damage arises from any negligence or omission of the company or its servants. This case is not brought within the statute. The plaintiff did not offer his horses to be carried, but hired a car in which he himself might load any number of horses. If the company had refused to hire out a car upon such request no action could have been maintained against them in consequence of such neglect and refusal, and as it is only against such an action that the company are restricted from relieving themselves, it appears to me that the statute has no application.

I think, therefore, that the finding of the learned Chief Justice of the Common Pleas should be restored, although my conclusion is arrived at upon different grounds than those relied upon by him ; and this appeal should be allowed, with costs.

So far as the horses are concerned, the case of *Morton v. The same defendants*, is not distinguishable from *Vogel*

2. Did the plaintiff know what the terms on the back of the paper were ?  
No. Unless so far as this answer is qualified by our answer to the third question.

3. Did the plaintiff know that the terms upon the request note and shipping bill were of the like nature as those upon the other papers he had signed for the carriage of horses by the Grand Trunk ? He supposed they were the same.

4. What loss did the plaintiff sustain by the damage done to his horses ?  
\$725.



against the same company, just decided. But assuming the right to make a special contract, the question yet remains whether the plaintiff had agreed to relieve the company from responsibility in respect of the particular damage here complained of as to the other goods.

The contract stipulates that the company shall not be liable for any damage that may occur to goods arising from leakage or breakage, and some other things not material to the present inquiry, and no doubt this would exempt them from damage arising from those causes, the result of mere accident, where no blame is imputable to them, but not from responsibility for their own negligence and want of care. Under such a contract the onus would be upon the owners of the goods to shew that the damage was attributable to the misconduct of the company or their servants, but if that is established the contract affords no answer.

Here the defendants' negligence was established, and that the damage to the goods arose from that and no other cause.

I find that the damage so sustained is estimated at \$89, and I can see no good reason for disturbing the verdict for that amount.

I think the judgment should be reduced to that amount and costs, and to that extent the appeal should be allowed.

PATTERSON, J.A.—This action is brought to recover damages for the loss of horses killed or injured while being transported on the defendants' railway, by an accident which was caused by the negligence of the defendants' servants.

The defence, with which we have to deal, is stated in the third paragraph of the statement of defence, which correctly sets out the document to which it refers. The material parts of the paragraph read thus: "3. The defendants say that the said horses, in the statement of claim mentioned, were delivered by the plaintiff to the defendants upon and subject to the terms and conditions of a certain special contract made by and between the plaintiff and the defendants, in writing, respecting the care, carriage and



delivery by the defendants of the said horses, in the statement of claim mentioned, and that the said horses were not delivered to or received by the defendants on any other terms or conditions than those expressed in the said special contract, to which the defendants crave leave to refer.

That the said contract, amongst others, did and does contain the following conditions and provisions respecting the said care, carriage, and delivery of the said horses, that is to say :

That they, the defendants, should not be liable for damage occasioned by accident.

That live stock must be fed by the owner, or at his expense, while in transit; and is taken entirely at his risk of loss, injury, damage, and all other contingencies, whether in loading, unloading, conveyance, or otherwise, and under the conditions in said contract contained, and all live stock shall be carried by special contract only, and upon the following conditions of carriage :

1. The owner of animals undertakes all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, or otherwise howsoever, no matter how caused."

It is quite clear, from many authorities cited in the judgment of Chief Justice Moss in *Fitzgerald v. Grand Trunk R. Co.*, 4 A. R. 601, that the terms of this condition are wide enough to cover the negligence of the defendants. The question is, whether the defendants are at liberty, under the legislation by which they are bound, to insist upon that reading of it.

We may first refer to the Railway Clauses Consolidation Act of 1851, 14 & 15 Vict., c. 51, various parts of which, including the clauses headed "Working of the Railway," which is section 21, and "General Provisions," which occupy section 22, were incorporated with the defendants' Special Act, 16 Vict., c. 37.

Clause "secondly," of section 21, enacted that the trains shall start and run at regular hours, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, and at the junctions

of other railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains; and such passengers and goods shall be taken, transported, and discharged at, from, and to such places, on the due payment of the toll, freight, or fare, legally authorized therefor, and the party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company.

That clause was, in the Con. Stat. of Canada, broken into three sections (C. S. C., cap. 66 ss. 96, 97, 98), which arrangement was adhered to after Confederation in the Railway Acts passed by the Parliament of Canada and by the Legislature of Ontario.

In the Dominion Railway Act of 1868, which did not apply to the defendant company, they formed sub-sections 2, 3 and 4 of section 20, sub-section 4 corresponding to section 98.

In 1871 the Dominion Parliament added to sub-section 4 the words, "from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants."

This amendment was made by 34 Vict. c. 43, sec. 5, and its effect (notwithstanding some general language in sec. 7) was merely to add to the sub-section of the Act of 1868, without extending that Act, or even the amended provision of sub-section 4, to any railway to which the Act did not previously apply. This was so decided in both the Queen's Bench and Common Pleas in 1873: *Allen v. Great Western R. Co.*, 33 U. C. R. 483; *Scott v. Great Western R. Co.*, 23 C. P. 182.

Then in 1875 the Dominion Parliament took the further step by 38 Vict. ch. 24, of extending to all railways under its jurisdiction the whole of section 20 of the Act of 1868 as amended by the Act of 1871; and in the following year the Legislature of Ontario placed the law, in relation to all railways over which it had jurisdiction, upon the same footing, by adding, by 39 Vict., chap. 21, to section 98

of the Consolidated Statute, a clause in the same words as those added to sub-section 4, except that "misconduct" is specified as well as "negligence" and "omission."

Mr. Bethune's suggestion that the interference with the defendants' right of contracting against their own negligence is *ultra vires* of the Dominion Parliament, would not, even if we could adopt it, help the defendants, because in that view of the division of legislative power the Provincial law would govern, and it remains as enacted in 1876.

No good reason has, however, been given for holding the Dominion legislation to be *ultra vires*, and there would be obvious inconvenience in having the liability of the carrier in respect of goods or passengers differing in different stages of the one journey under the statute law of each Province through which the railway passed.

So far we have seen that after the passage of the Act of 1875, the defendants were subject, as they had always been, to the second clause of section 21 of the Act of 1851, and were further subject, under section 20 of the Act of 1868, to the same rules as re-enacted in sub-sections 2, 3 and 4, but with the extension of sub-sec. 4 made by the Act of 1871.

Then came the Consolidated Railway Act of 1879, 42 Vict. cap. 9; and the defendants contend that after its passing their liability was restored to the original limits under the Act of 1851.

The Act of 1879 repealed the earlier Acts of the Dominion Parliament, but in section 100 it was recited that certain enactments, including sub-section 4, had been declared by the Act of 1875 to apply to all railways within the jurisdiction of the Parliament of Canada, and then enacted that they should so apply accordingly.

This is a very embarrassing piece of legislation. The Act of 1875 had not applied sub-section 4 alone as here recited, but the whole of section 20 of the Act of 1868. In so doing it had added nothing to the law as it affected the defendant company but the restrictive addition made in 1871 to sub-section 4, for all the rest of section 20 repre-

sented *verbatim* section 21 of the Act of 1851, with an extract from section 22. The position of the defendant company, in common with any other companies to which the Act of 1851 and that of 1875 both applied, was, that to the rules by which they had always been bound there was added this proviso, restrictive of their right to stipulate for immunity from the consequence of their own or their servants' negligence.

It appears to me that the difficulty in the way of applying to companies of this class the provision of the Act of 1879 respecting sub-section 4, though considerable, is not insurmountable. A solution has been given in the judgment now in review by holding that the *premises* referred to in the words, "the party aggrieved by any neglect or refusal in the premises," must mean the premises to which the term referred in the Acts of 1868 and 1869, and therefore that the sub-section must be taken to relate to an action for breach of some duty imposed by sub-sections 2 or 3. This way of solving the difficulty would certainly have the merit of making the rule apply to railways which were not governed by the General Act of 1851, as *e. g.*, the Great Western Railway, as well as to those which, like the Grand Trunk Railway, were governed by that statute. Still I do not see my way to fully adopt the reasoning on which that construction is arrived at. The effect of it seems to be to make section 100 declare that sub-sections 2 and 3 are to apply to all these roads, while the statute has carefully confined that declaration to sub-section 4.

The solution which commends itself to my mind brings out the same result, as far as the defendant company is concerned, and I am not sure that, after all, it differs otherwise than in the mode of expressing it from that acted on in the court below, so far as that may affect companies formed under the Act of 1851.

Observe the language of section 100, reading it, as we may do, without noticing the matters with which it deals, other than sub-section 4. The section does not enact in direct terms, or as a new law, that the sub-section shall



apply to these railways. It recites that it had been declared by the former Act so to apply, and then proceeds to enact that it shall so apply *accordingly*. That I understand to mean in the same manner, or with the same effect, as under the Act of 1875. In other words, I take the fair meaning of the section to be that the modification of the rights of the companies affected by the application of the restrictive proviso by the Act of 1875 shall continue.

How, then, does the restrictive provision of the subsection apply in the present contest?

The action is given by the enactment, which is the same in the Act of 1851 as in sub-section 4, to the party aggrieved by any neglect or refusal *in the premises*. It is only to the action thus given that the restriction applies.

What are *the premises*? Clearly those duties imposed by the earlier part of the second clause of section 21 of the General Act of 1851, which I have already quoted, and which may be shortly recapitulated as being:

To start and run trains at fixed and regular hours; to provide for the transport of passengers and goods offered at starting and stopping places established for receiving and discharging way passengers and goods; and to transport and discharge such passengers and goods on payment of the freight or fare legally authorized therefor.

The transaction before us does not appear to me to come within this class of duties, which closely resemble those cast by the Common Law on common carriers. I do not place stress upon the circumstance that the goods to be carried were horses, nor stop to inquire whether these compulsory provisions were intended to apply to horses, although they may be in law not incorrectly described as goods, though not usually so spoken of in common parlance, and although the fact that railways supersede other modes of conveyance, which is sometimes put as a reason for regulating their traffic by legislative enactment, can scarcely hold good with respect to horses. I do not know what may be the toll, fare or freight legally authorized for carrying horses, whether so much a head, or so much by weight,



or so much by a cubic foot of space; but assuming that there is a legally authorized charge, and assuming for argument's sake that a person offering a horse, or twenty horses, at a way station, has a right under the statute to have them carried on payment of the legally authorized toll, fare, or freight, I think a transaction of that kind is the only one covered by the statute.

The transaction before us is very different. The plaintiff, through Fanning, his agent, hired a car into which he was at liberty to put as many horses as it would hold, or as few as he pleased. In either case the price was the same. It is shewn, both by the plaintiff and by Fanning, that the course of business when a car is hired in this way is for the hirer to load and unload the horses, himself or his men going with them to take care of them and being usually carried by the railway free. The shipping bills are not for so many horses, but for "1 car horses."

The question whether this transaction came within the statute is not touched in the judgment now in appeal, and may not have been pressed upon the Court below. It has, however, been distinctly raised before us both in the formal grounds of appeal and in argument, and I think it should be decided in favour of the defendants. The action is not, in my opinion, an action for any neglect or default in respect of the specified duties, and therefore the right of the defendants to stipulate for immunity is not touched by the restrictive proviso. The necessity for bringing a case within the terms of the sub-sections 2 and 3, in order to claim the benefit of the proviso in sub-section 4, was affirmed, while the Act of 1875 was in force, in *Scarlett v. Great Western R. W. Co.*, 41 U. C. R. 211.

If the appeal is decided upon this ground, it becomes unnecessary to consider closely one question on which the judgment of the Queen's Bench Division differed from the opinion pronounced by the Chief Justice of the Common Pleas, after the trial of the action, namely, whether the circumstance that the plaintiff made a special contract for the carriage of the horses by signing a request note

which contained the condition on which he now relies, precludes him from insisting that the terms of the statute prevent the defendants availing themselves of that condition.

My present impression is, that while the fact of entering knowingly into a special contract will usually be strong evidence, against the man who does so, that he was not acting under the provisions of the statute, but waived whatever protection it might have afforded him, such a contract may, nevertheless, be so forced upon a shipper, as to leave to the conditions it may contain the character of those notices, conditions or declarations which the statute declares shall not relieve the company. It must, I conceive, be a question in every case depending on its own circumstances.

In the present case we have no fact found, except that the plaintiff supposed the terms of the request note and shipping bill to be the same as on other papers he had signed for the carriage of horses by the Grand Trunk Railway, but did not know otherwise what the terms were. This finding should be supplemented, I suppose, by the fact shewn by the evidence, that the terms were the same as those on the other papers; but without more definite information, I should prefer to give no further opinion on the effect which this contract might have had, if it had related to goods offered for carriage within the terms of the statute.

I think we should allow the appeal.

The contract in *Morton v. Grand Trunk R. Co.* resembled that in Vogel's case, in relating to the hire of a car, and not merely to the transport of goods from station to station, with the additional special feature that it extended to the carriage or forwarding of the load beyond the defendants' railway.

In both cases I think the same reasons exist for allowing the appeals and restoring the original judgments, so far as the contracts touch the carriage of horses.

In *Morton's Case* there were other articles carried and injured by a collision. As to these the terms of the con-

tract were not more express than those which were the subject of the decision in *Fitzgerald v. Grand Trunk R. Co.*, and which were held not to exempt the company from liability for negligence.

The verdict in *Morton's Case* should, therefore, be for the plaintiff, for the amount mentioned by my brother Burton.

OSLER, J. A.—This is an appeal from the judgment of the present Chief Justice of this Court, of Mr. Justice Armour, and of Chief Justice Cameron, while the latter was a member of the Queen's Bench Division of the High Court. Upon a careful consideration of that judgment, I am of opinion that it ought to be affirmed.

In the first place, I think these defendants are subject to the statute law which takes away the defence in an action of this kind, where the loss has been occasioned by the negligence of the company or their servants.

The 4th section of the 38 Vict. c. 24 (D.), 1875, enacted that section 20 of the Railway Act, 1868, as amended by section 5 of the Act 34 Vict., c. 43 (1871), should apply to every railway theretofore incorporated, or which should thereafter be incorporated, and which was subject to the jurisdiction of the Parliament of Canada.

This section, as amended, provided (sub-sec. 2) that trains should start at regular hours, and should furnish sufficient accommodation for the transport of all such passengers and goods as should within a reasonable time previous thereto be offered for transportation at the place of starting, and at junctions and usual stopping places, &c.

Sub-section 3. Such passengers and goods to be taken, transported and discharged at, from and to such places on the due payment of the toll, freight, or fare legally authorized therefor.

Sub-section 4. The party aggrieved, by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from the negligence or omission of the company or its servants.

As regards this question, the legislation applied to these defendants by the Act of 1875 was that, and no other, which was then contained in sub-sections 2, 3, and 4, of section 20 of the Act of 1868; for the former Act was so expressed that it was not necessary to look outside of these clauses.

The Act of 1868 and the 38 Vict., c. 24, were, with other Acts, repealed by the 102nd section of the Consolidated Railway Act of 1879, subject to the provisions thereafter in that section mentioned, one of which is that the Act is not to be construed as a new law, but as a consolidation and continuation of the repealed Acts, subject to the amendments and new provisions incorporated with them.

Section 100 recites that the enactments contained in sub-section 4 of section 25 of that Act were declared by the 38 Vict., c. 24, to apply to every railway theretofore incorporated, and enacts they shall so apply accordingly. The recital erroneously states that it was only the enactment contained in sub-sec. 4 which was thus applied, whereas it was the whole of section 20 of the Railway Act of 1868, as amended by the Act of 1871.

Sub-sections 2, 3, and 4, of section 25 of the Act of 1879, are in the same terms as the amended section 20 of the Act of 1868.

The difficulty, which I think is more apparent than real, is caused by this erroneous recital.

Even if it be taken that only the enactment in sub-section 4 of section 25 of the Act of 1879 is applied to the defendant railway, in consequence of the peculiar phraseology of section 100, it gives an action to the party aggrieved by neglect, &c., in *the premises*. What premises? The premises on which it is founded, those namely, in sections 2 and 3, immediately preceding it. But those sections, it is said, have not been applied to these defendants, as they formerly were when they stood in the Act of 1868, by the 38 Vict., c. 43, so that sub-section 4 has nothing to operate upon. Be it so: though I am not disposed to disagree with the Court below that they are imported into sub-section 4, by force of the reference therein to the premises and of section 100;



yet as we find in sections 96 and 97 of the Railway Act, C. S. C., c. 66 (sections 2 to 125 of which Act are expressly applied to these defendants, overriding their Special Act of 16 Vict. c. 37), enactments which precisely correspond with the premises referred to in sub-section 4 of section 25, we may, I think, properly hold that the premises mentioned in that sub-section mean the statutory requirements similar to those mentioned in sub-sections 2 and 3, to which the defendants are subject by sections 96 and 97 of the Railway Act, C. S. C., c. 66.

The next question is, whether the "notice, condition, or declaration," mentioned in the Act, includes a special contract such as the defendants rely on.

If it does not, it must be said that an extremely simple method of preventing the application of the Act is open to railway companies.

Mr. Bethune argued that the clause referred only to notices, declarations, &c., made to or imposed on the public at large, such as were pointed at by the Carriers' Act, 11 Geo. IV., 1 Wm. IV., c. 68, or at the furthest to notices, &c., addressed to the individual sender of goods as the language of the company only, and not formally agreed to or signed by the sender.

I do not think it possible so to limit the effect of the clause.

In this country, before the passing of the Act of 1871, just as in England before the passing of the Carriers' Act, there was nothing to prevent carriers from contracting to limit their liability in any way or to any extent they thought proper. The object of the notice, condition, or declaration, both here and in England, was to impose terms upon the sender in restraint of the carriers' liability.

In *Kerr v. Willan*, 6 M. & S. 150 (1817), it was held that the notice, to be effectual, must be brought home to the particular customer, which shews, as Blackburn, J., said in *Peek v. The North Staffordshire R. W. Co.*, 10 H. L. Cas. 496, that the condition operated by way of contract and not by way of restriction on the public profession, and he



refers to the statement of the law by Mr, J. W. Smith, in the first and subsequent editions of his "Leading Cases": "If the notice was not communicated to his employer, it was of course ineffectual; but if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by the contents:" Sm. L. C., 7 ed., p. 228.

The Carriers' Act took away the vexatious and imperfect mode of protecting themselves which carriers had adopted, providing, by the 4th section, that a notice addressed to the public at large should have no effect in limiting their liability, but expressly enacting, in the 6th section, that nothing in the Act should affect or annul any special contract made between the carrier and the sender. It was held that the 4th section was not applicable to a notice specifically delivered to the sender, and he was taken to have agreed to its terms if he sent the goods.

In *Walker v. The York and North Midland R. W. Co.*, 2 E. & B. 750, 761 (1853), a question was, whether there was any evidence of a special contract. The defendants had given the plaintiff a notice that they would not carry fish at reduced charges except on certain conditions. Wightman, J., said: "The question is, whether the fish was received on a contract to carry on these terms. Now, the plaintiff did not assent in express words to these conditions; on the contrary, he objected to them; but still, for all that, he sent the goods, knowing that they would be accepted on those conditions only; and I think he must be taken to have sent them on these terms, unless there was something in the law to prevent the conditions from binding."

That was the state of the law in England when the Railway and Canal Traffic Act, 1854, was passed, the 7th section of which enacted in effect that companies should not be permitted to relieve themselves from liability caused by the neglect or default of the company or their servants, but that this should not prevent them from making such conditions as should be adjudged by the Court or a Judge before whom any question relating thereto should be

tried, to be just and reasonable, and further, that, though just and reasonable, such conditions or special contract should not be binding unless signed by the sender of the goods: *Simons v. Great Western R. Co.*, 18 C. B. 805; *Peek v. North Staffordshire R. W. Co.*, 10 H. L. Cas., p. 566, per Westbury, Chancellor.

There is nothing which in this country requires the contract between the carrier and the sender to be in writing, and I see no distinction between such a contract evidenced in the most formal manner by the signature of both parties, and the contract which we have seen will be implied from sending goods on terms and conditions stated by the carrier.

Then we have here that "something in the law to prevent the conditions from binding," which was wanting in *Walker's Case*, *supra*.

In the shipping note and receipt exchanged by the parties, the terms on which the goods were delivered and received are called, just as in the Act, general "notices and conditions" of carriage; and we have only to look at the cases in our reports, prior to the Act of 1871, to see that the contracts which the railway companies were in the habit of exacting from their customers were of the same character, and entered into in the same manner as the contract now in question.

By means of these special contracts railway companies were acquiring an entire immunity from liability, and the Courts began to point out "the necessity and justice of legislative redress": per Morrison, J., in *Hamilton v. Grand Trunk R.*, 23 U. C. R. 600, 610; Draper, C. J., *ib.*; *Bates v. Great Western R. Co.*, 23 U. C. R. 544, 546; *Spettigue v. Great Western R. W. Co.*, 15 C. P. 315, 319.

Then came the legislation of 1871, which in *Scott v. Great Western R. Co.*, 23 C. P. 182, and in *Allen v. Grand Trunk R.*, 33 U. C. R. 483, was soon discovered to be ineffectual as against the chief offenders; and the Act of 1875 was then passed expressly including them.

The pendulum may have swung too far in the opposite direction, and we may think it would have been juster to

all parties if it had been left to the Courts, as in England, to determine as to the reasonableness or otherwise of conditions; but it is difficult to believe that it was not intended by this legislation to place railway companies in a different position from that which they occupied in England under the Railway and Canal Traffic Act, and to prevent them from contracting themselves out of liability for negligence; and we may say, as Blackburn, J., said in *Peek's Case*, that "we cannot assume that the Legislature were ignorant of the meaning which had been attached to the words, notice, conditions, &c., or that they intended, by using these words, to leave the railway companies and the public in precisely the same relation to each other that they formerly occupied."

In short, under the Railway and Canal Traffic Act, while railway companies may limit their liability by a special contract in writing, it remains with the Courts to determine whether the conditions imposed are just and reasonable: *Brown v. Manchester, &c., R. W. Co.*, 8 App. Cas., 703. With us that question cannot arise. The condition imposed, exempting the company from liability for negligence, may be such as would in England, under the Railway and Canal Traffic Act, be deemed reasonable; but that is not the test here. If the notice, condition, or declaration, does not include the special contract in use before the passage of the Act, the company's position is unchanged. It remains, as it did previous to the Act, a mere matter of grace on their part to concede any favourable terms to the sender of the goods. They are not bound to do so, and the contract would be valid whether the conditions were reasonable or not.

I may refer also, on the question of exemption by special contract and the necessity for legislative restriction, to *Mynard v. Syracuse, &c. R. W. Co.*, 71 N. Y. 180; *Stinson v. New York Central R. W. Co.*, 32 N. Y. 333; *Railroad Company v. Lockwood*, 17 Wallace 357.

The only other objection I find it necessary to notice, is that mentioned in the fifth reason of appeal, namely, that

the defendants in fact only furnished to the plaintiff a car, which the plaintiff loaded, the defendants agreeing to haul it, and the plaintiff undertaking all risks of casualties, even if caused by the negligence of the defendants' servants.

I do not think that this ingenious method of evading the responsibilities of a carrier has hitherto suggested itself to a railway company, and I do no injustice to Mr. Bethune's argument in saying that his other objections were pressed with more confidence than this one. It is not noticed in the judgment of the Court below, or in that of Wilson, C. J., at the trial.

Such a contract is not the contract found by the jury, so far as they find any contract; nor is it, as I read the shipping note and receipt, the contract intended to be entered into by the parties, which, except as varied by the conditions, is the ordinary one for the carriage of goods, not for the haulage of a car. The company were required to receive, and they gave a receipt for, "the undermentioned property," described under the heading of "Number of packages and species of goods" as "1 car horses," meaning of course a number of horses sufficient to make up a car-load.

It was the case mentioned in the 14th condition, of goods being carried by the car-load, and it will be seen by the condition that the company expressly stipulate that no goods of that kind will be carried except by special contract.

I think these were goods "offered for transportation" (sub-section 2 of section 20), in the same sense that a single head of stock or a single package or consignment would be so; and the company only distinguish between such cases and that of carriage by the car-load by conditions applicable to each.

MORRISON, J. A.—I concur in the judgment of my brother Osler, that the defendant railway is subject to the sections of the statutes referred to which deprive the company of defence in an action like this, where the loss has been

occasioned by the negligence of the company or their servants, and I am of opinion with my brother Osler that it was the intention of the Legislature so to deprive them. Being of that opinion, I think the appeal should be dismissed.

The Court thus being equally divided, the appeal was dismissed, with costs.

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### PEART V. THE GRAND TRUNK RAILWAY COMPANY.

*Railway company—Collision at crossing—Neglect to sound whistle—Contributory negligence—Nonsuit.*

The deceased, who was well acquainted with the locality, while driving along a road running in the same direction as and crossing the railway, was killed at the crossing by a locomotive, not a regular train. The jury found that the engine was going unusually fast; that the whistle was sounded at another crossing, three-fifths of a mile off, but was not continued; and that deceased was not guilty of contributory negligence. The Common Pleas Division, upon the evidence more fully stated below, refused to disturb this verdict, and on appeal their judgment was affirmed, CAMERON, C. J., dissenting, on the ground that the plaintiff was bound to disprove contributory negligence; that she had failed to do so, for had deceased looked he must have seen the train coming; and that there should therefore have been a nonsuit.

*Davey v. The London and South Western R. W. Co.*, 11 Q. B. D. 215; 12 Q. B. D. 70, and *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155, commented on.

*Per* PATTERSON, J. A., and ROSE, J., whether admitting *Davey v. The London and South Western R. W. Co.* to decide that the plaintiff must negative contributory negligence, it is applicable here, in view of the statutory duty to give warning by bell or whistle, which does not exist in England.

THIS was an appeal by the defendants from a judgment of the Common Pleas Division, discharging a rule *nisi* to set aside a verdict entered for the plaintiff, the administratrix of the late William Peart, who was accidentally killed while attempting to cross the railway of the defendants near the village of Cainsville in the county of Brant, by a locomotive then under the management of the servants



of the company. The circumstances under which the accident happened are fully stated in the judgments of the Court below, and on the present appeal.

On discharging the rule *nisi*, the following judgments were given by the Divisional Court.

GALT, J.—This was an action tried before Burton J. A., at Brantford, brought by the plaintiff to recover damages for the death of her husband, who was killed on the track of the defendants on the evening of the 3rd of April. At the conclusion of the evidence and the charge, the learned Judge submitted several questions to the jury, which, with the answers, are as follows:

1st. Were the Railway Company or their servants guilty of negligence in not ringing the bell as required by law before reaching the crossing where the accident happened? Answer—Yes.

2nd. Did they sound the whistle before reaching this crossing, and if so, at what distance from this crossing was it first sounded? Answer—Sounded the whistle before reaching the first or Lossing crossing.

It may be remarked that this crossing is at a distance of about three-fifths of a mile from the crossing where the accident happened, that is to say, more than twice the distance required by law.

3rd. If the whistle was in your opinion sounded and the bell rung at all, did the Company's servants so sound the whistle or ring the bell continuously or at short intervals until the engine crossed the road where the accident happened? Answer—No.

4th. Did the injury to deceased occur in consequence of any neglect of the company? If so, what was the neglect or omission which in your opinion caused the injury? Answer—Yes.

5th. At what rate of speed was the engine going? Answer—Unusually fast.

6th. Could the deceased, if he had used ordinary diligence, have seen the engine in time to avoid a collision? Answer—No.

7th. Was the deceased, in your opinion, guilty of any want of ordinary care and diligence which contributed to the accident; if so, state in what respect? Answer—No.

The jury then rendered a verdict for plaintiff (a). At the

(a) The verdict was for \$4,000, distributed between the widow and her six children, as specified by the jury.

last Michaelmas sittings, Bethune, Q.C., gave notice of motion, and also obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict of the jury should not be set aside and a judgment entered for defendants, or a nonsuit entered, on the ground that the said verdict is against law and evidence, and on the ground of contributory negligence on the part of the deceased in attempting to cross the railway track in the face of the approaching locomotive.

This rule was argued by Bethune, Q.C., for defendant, and cause shewn by VanNorman, Q.C., for plaintiff.

The jury have in this case found every issue for plaintiff. In *Tyson v. The Grand Trunk R. W. Co.*, 20 U. C. R., page 256, which was an action brought for the same neglect of duty as that now complained of, the late Sir John Robinson, C.J., in giving judgment says: "The neglect complained of was that defendants' servants omitted to ring a bell or sound a whistle until within 24 or 25 rods of the crossing, instead of giving the signal at the distance of 80 rods, as the law requires. The plaintiff's complaint of omission in this respect was abundantly supported by evidence. On the other hand, the defendants' conductor in charge of the train, the engine driver and the baggageman, all swore positively that the whistle was sounded before the train got within 80 rods of the crossing. The evidence was so contradictory that the jury had to determine on which side the evidence preponderated. We think we cannot find fault with their verdict. We certainly cannot feel satisfied that it was wrong. The evidence was of that character that a verdict given either way ought to settle that question of fact. We mean as to whether the proper signals were given in time."

The foregoing judgment is in accordance with the evidence and the findings in the case now before us. There could not be a stronger case than the present, unless we were prepared to hold that no verdict can be upheld when contradicted by the testimony of the engine driver and the fireman. Two of the witnesses for the plaintiff were young girls who were standing by the track when the engine passed, and were some 200 yards from where the accident happened, and one of whom actually saw the collision, and they both swear positively that no bell was rung or whistle sounded. Their evidence is supported by a great number of other witnesses. So far, then, as the rule complains that the verdict is against evidence, it must be discharged. The

learned Counsel for the defendants, both at the trial and on the argument before us, contended strongly that the deceased had been guilty of contributory negligence in attempting to cross the track without looking for the engine, and that therefore the plaintiff could not recover. We have read the learned Judge's charge, and think that he called the attention of the jury particularly to this question, and that no objection can be taken to it, and the jury in answer to his question, specially directed to it, have found that the deceased was not guilty of contributory negligence.

The deceased was on his way home on the evening in question driving along a road which runs in the same direction as the railway, and crosses it at such an angle as would not necessitate the driver turning his head. The horse according to the evidence of one of the defendants' witnesses was a good gentle free horse after it was broken; he was a little stubborn when he was broken, he got over that.

We had occasion to review all the cases bearing on this subject in the case of *Miller v. The Grand Trunk R. W. Co.*, 25 C. P. 389, so it is unnecessary to do more than refer to that as shewing what we consider the law to be as respects what is the duty of persons in crossing railway tracks. In the case now before us, it appears that the injury was not occasioned by one of the regular trains, but by a locomotive which was being driven to Fort Erie. There was therefore no reason for the deceased to expect a train to be passing at that hour, and there was a greater responsibility on the part of the servants of the defendants to ring the bell or sound the whistle, neither of which was done. The train was also being driven at a high rate of speed; the deceased in crossing the track would from the direction of the road drive straight on; there was no necessity for his looking either to the right or left, and as the train was going in the same direction there was no warning whatever given to the unfortunate man. Unless we were to hold that it is imperative on a man to stop before he attempts to cross a railway we cannot find fault with the finding of the jury in this case.

To quote again from the language of Sir John Robinson, in *Tyson's Case*, "These cases of collision on railways are among the most unsatisfactory that juries have to deal with from the difficulty of getting at the real facts. On the one hand, when the signals have been properly given,

it seems generally possible to find persons who having been either in or near the train are ready to give evidence that they heard no bell or whistle, and this may well have happened from their not thinking of it at that moment and so not noticing the signals. And on the other hand, there is, we must say, too much reason to fear that neglect to give the signals at the proper time and to continue them as they proceed to the crossing is a matter of very common occurrence ; so much so as to make it incumbent on railway companies, for their own sakes, to be most earnest with their servants upon that point."

OSLER, J.—The jury might have found for the defendants, and such a finding would not have been disturbed, but as they have taken the more favourable view of the plaintiff's case after hearing all the evidence, I cannot say that the evidence so strongly preponderates in the defendants' favour as to justify the Court in setting aside the verdict.

On the question of contributory negligence the case was sent to the jury with a direction which could not be complained of, nor looking at all the circumstances would I venture to say that they did not come to the right conclusion.

So long as the Company content themselves with relying upon servants who may be careless or forgetful, instead of employing such means as science may suggest, *e. g.*, by automatic bells, &c., for giving the warning prescribed by law, they may expect to find juries taking that view of the evidence which is most unfavourable to them, nor am I prepared to say that as a rule juries have been wrong in doing so.

WILSON C. J., concurred.

The appeal came on to be argued before this Court on the 8th September, 1884\*

*Bethune*, Q.C., for the appellants. The evidence in the case shews that the deceased was guilty of contributory negligence. It was shewn by the evidence at the trial that the deceased was well acquainted with the locality, and

\* *Present*.—HAGARTY, C. J. O., PATTERSON, J. A., CAMERON, C. J., and ROSE, J.



being so, we contend that the learned Judge at the trial erred in not telling the jury that such a person about to cross a railway was bound to look out for any approaching train; and that if a person did attempt to cross the track without adopting that precaution, and in consequence sustained an injury, or as in this case was killed, the company could not be made responsible therefor; or if he did look out for the train, and seeing it approach still ventured to cross and was injured, in either case he would be guilty of contributory negligence, and so not entitled to recover. In either case there was really no question to submit to the jury, and the Court should have withdrawn the case from the jury or directed them to find in favour of the defendants; and the learned Judge we submit erred in leaving it to the jury to say whether the deceased had been guilty of contributory negligence in attempting to cross the track at the time of the accident occurring.

Upon the whole evidence it is submitted that the real cause of the accident was the fact of the deceased attempting to cross in the face of an approaching train.

He referred, in addition to the cases mentioned in the judgment, to *Johnston v. The Northern R. W. Co.*, 34 U. C. R. 432; *Nicholls v. The Great Western R. W. Co.*, 27 U. C. R. 382; *Philadelphia and Reading R. W. Co. v. Spearen*, 47 Penn. St. 300; *Stubley v. The London and North-Western R. W. Co.*, 4 H. & C. 83; *Dolan v. Delaware and Hudson R. W. Co.*, 71 N. Y. 285.

*VanNorman*, Q.C., for the respondent. The evidence at the trial fully sustains the verdict rendered by the jury, and warranted the Court in refusing to disturb their findings, which were all in favor of the plaintiff's right to recover. The defendants at the trial failed to establish any act on the part of the deceased that would warrant either the Judge at the trial or the jury in finding that the deceased had been guilty of any contributory negligence. In fact, unless the Courts are prepared to say that on all occasions when the hired servants of the company swear to a fact, no matter if contradicted by any number of disinterested



witnesses, such fact must be taken as established, the jury in this case could not do otherwise than find in favour of the plaintiff, and the Court following the principle enunciated in *Slattery v. The Dublin, &c., R. W. Co.*, 3 App. Cas. 1155, and which has been acted on ever since that decision, could not do otherwise than sustain such finding: *Tyson v. The Grand Trunk R. W. Co.*, 20 U. C. R. 256; *Miller v. The Grand Trunk R. W. Co.*, 25 C. P. 389; *Bilbee v. The London, Brighton, &c. R. W. Co.*, 18 C. B. N. S. 584,

October 20, 1884. HAGARTY, C. J. O.—A careful examination of the evidence in this case brings me to the conclusion that there is no ground for the interference of this Court.

Numerous cases have been before our Courts involving the same disputed questions, as to whether or no the signals prescribed by law were given by the railway trains.

I must say that I do not just now remember one in which the absence of such signals was sworn to with more distinctness than in the case before us. The evidence of the driver and fireman was express in favour of the defendants.

The testimony of such witnesses for the plaintiff as Dickinson, Everett, Dick, Ilite, and especially T. Stuart, was certainly more satisfactory than the statements we often hear as to witnesses not noticing the using of the signals. Several others corroborated the evidence of these witnesses named.

It is difficult to read the whole of the testimony without feeling that the finding of the jury on this branch of the case was probably right. The learned Judge who tried the case is not dissatisfied with the finding, having had the advantage of seeing all the witnesses. The defendants certainly cannot complain of his charge, which very fully and fairly presented for their consideration all the evidence and arguments of the defendants in support of their contention, first, that they were guilty of no negligence, and

secondly, as to the alleged contributory negligence of the deceased.

I think it would have been impossible to uphold a nonsuit in such a case.

Mr. Bethune, at the close of plaintiff's case, did not feel justified in asking for it, but when the evidence on both sides had been heard, he urged that there was no case to go to a jury to shew the signals were not given—no evidence that could prevail against the positive evidence on the part of defendants: 2, that deceased was guilty of contributory negligence.

Both these questions were for the jury, and were very fairly left to them.

I do not see how we can say that they were not properly answered.

Great stress was laid in the argument on the late case of *Davey v. London and South Western R. W. Co.*, just reported in 11 Q. B. D. 213, where the majority of the Court, Lord Coleridge, and Denman, JJ., (Manisty, J., not assenting,) held that the nonsuit entered at the trial was right on the ground that the undisputed facts of the case shewed there was no negligence on the part of defendants, and that the plaintiff's own want of caution was the sole cause of the accident.

The plaintiff sued for injuries sustained at a level crossing. He stated that before crossing he looked to the right along the down line, but he admitted he did not look to the left along the up line, and that if he had looked he must have seen the train coming.

The Court held there was no duty imposed on the defendants which was shewn to have been neglected, and that the plaintiff was the sole cause of the accident to himself.

In appeal, 12 Q. B. D. 70, Brett, M. R., and Bowen, L. J., upheld the decision, (Baggallay, L.J., dissenting.) They considered that the plaintiff "did give evidence, though not strong evidence, of negligence of the defendants, which the jury would have been justified in saying, was in part at least the cause of the accident," (p. 71.)

But the plaintiff had admitted that if he had looked to the left up the line he must have seen the train coming therefrom; and the Master of the Rolls said, p. 72: "It seems to me impossible for any reasonable person to say otherwise than that he ought not to have crossed then. \* \* The plaintiff himself, shewed, by uncontradicted evidence, that he had omitted to do what any reasonable man would have done, and had therefore been guilty of negligence."

The judgment of Baggallay, L. J., and his reference to *Slattery v. Dublin and Wicklow R. W. Co.*, 3 App. Cas. 1155, are well worthy of consideration.

If this case stands unchallenged it will probably revive the controversy which lasted so long, as to the respective functions of Judge and jury.

We have seen a note of a case, *Wright v. Midland R. W. Co.*, L. Times, 12th July, 1884, p. 195, which will increase the materials for discussion.

But giving the fullest effect to Davey's case it cannot govern the case before us. We have no such evidence as the plaintiff there gave against himself. It is mere conjecture in our case whether the deceased did or did not look up or down the line, or whether he heard or did not hear, or tried to hear the ordinary signals that he had a right to expect. It was a fair argument on defendants' part that the jury should infer from the evidence that he did not look or he did not listen to hear signals. But it was wholly a matter for the jury. They have absolved him from all charges of contributory negligence, and we cannot say any more than that their decision ought not to be interfered with.

PATTERSON, J. A.—If the law laid down in *Davey v. London and South Western R. W. Co.*, 12 Q. B. D. 70 went the length, to which I do not understand it to go, of casting on a plaintiff who sues for an injury caused by the negligence of the defendant the burden of affirmatively proving that he took all precautions to avoid the accident, or in other words of negating contributory negligence, as

a part of his case, it would not necessarily govern us in this country

In England there is no such statutory provision as that of our law which requires a warning to be given when approaching a level crossing, by ringing the bell or sounding the whistle. If that precaution is neglected, there is no escape for the railway company from the imputation of negligence. If no warning is given, and a person crossing the track is struck by the train, there is evidence enough in the proof of those facts to convince a jury, if nothing else is shewn, that the accident was caused by the neglect to give the warning. To hold that the plaintiff must shew affirmatively that he looked up and down the track or took other precautions which might have averted the danger arising from the defendants' negligence, would be to practically relieve the company and its servants from the duty cast upon them by the statute.

It may happen that in proving the cause of action, the plaintiff having necessarily to shew where he was and what he was doing when the accident happened, may prove such negligence on his own part that the Judge may be compelled to say that, on the evidence given, a jury of reasonable men cannot say that the accident is shewn to have been due to the defendants' negligence.

That was the position in Davey's case. The plaintiff himself admitted his own negligence in going incautiously and without looking for the train upon a crossing, when the law made no provision for his receiving any warning of the approach of the train, and when his attention had been given to looking one way, though he neglected to look the other.

Some of the language of the Master of the Rolls in 12 Q. B. D. at p. 71, seems calculated to convey the idea that the plaintiff must negative contributory negligence as part of his case, but I do not understand him or any of the other learned Judges to go to that length. He said: "It is for the plaintiff to shew that the accident which happened to him was caused by a negligent act of the defendants,



or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident; because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff was also guilty of negligence which contributed to the accident, so that the accident was a result of the joint negligence of the plaintiff and the defendants, then the plaintiff cannot recover; it being understood that if the defendants' servants could, by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident."

This passage is more favourable, as it is worded, than any other that can be selected from the judgments, to the present contention of the defendants.

I do not understand it, when read in connection with other parts of the judgments, and having regard to the character of the evidence to which the remarks were addressed, to be intended to assert more than that, the issue being on the plaintiff, it is for him to give evidence from which it can be reasonably inferred that the accident was caused by the negligence of the defendants, not merely that the defendants were negligent. But taking it to have a wider meaning, I think the concluding portion of it shews that under our law it would be much more difficult to nonsuit than in England. I am supposing a case of neglect to ring the bell and sound the whistle, and we may suppose the foot passenger to walk on the crossing without looking up or down the line, his thoughts being pre-occupied, as in what is called a brown study. Conceding that this would be negligence of the passenger, could it be said that an engine driver used reasonable care to avoid the accident to which the passenger's want of care exposed him, if he neglected to do what the law prescribed, and what, if done, might have roused the passenger to a sense



of his danger? If it could be so held, it must be by the jury and not by the judge.

I am not satisfied that a case occurring here with facts precisely like those in Davey's case, could properly have been withdrawn from the jury. I think the statutory duty would prevent it. But the facts before us are materially different, as we have no admission, but only evidence, the credibility and value of which must be pronounced upon by the jury and not by the Judge.

I agree that we must dismiss the appeal.

CAMERON, C. J.—I am unable to distinguish this case in principle from that of *Davey v. The London and South Western R. W. Co.*, 11 Q. B. D. 213, affirmed in appeal, 12 Q. B. D. 70. In giving judgment in the Divisional Court, Lord Coleridge, C. J., laid it down as a clear rule of law that in actions of this kind the plaintiff is bound to establish two things: first, that defendant did or omitted to do something which a reasonably careful person would not have done or omitted to do; and secondly, that the plaintiff's injury was thereby occasioned. I think for the purpose of this appeal it must be taken, though the evidence does not satisfy my mind, that the defendants omitted to perform the duty required of them by law to ring a bell or sound a whistle eighty rods from the crossing where the deceased was killed, and continue to sound the same at short intervals till the crossing was passed. So the plaintiff made out the first thing required of her to entitle her to succeed. It is on the second point that I think she fails, namely: to establish that the omission to perform the statutory obligation caused the death of deceased, which it seems clear to me, in fact, resulted from the deceased's own want of prudence in attempting to cross the track without before doing so looking to see if a train was approaching, or if he looked and saw, recklessly taking the chance of crossing before the train reached that point.

In *Davey's Case*, the facts were that the plaintiff was cross-

sing the defendants' railway on foot ; there were two tracks or lines. In crossing the first, he looked in one direction, that is along what was called the down line, standing on which he could see for several hundred yards in both directions, but he admitted that he did not look along the up line, and if he had, would have seen an approaching train which, on stepping on the up line, struck him and caused the injuries for which he sued. The engine driver did not whistle. There was a gatekeeper employed by the company who, at the time of the accident, stood at the opposite side of the crossing talking to two boys, and with a furred flag in his hand, who gave no warning to the plaintiff. Upon these facts appearing at the trial, *Huddleston, B.*, nonsuited the plaintiff. The *Queen's Bench Divisional Court* upheld the nonsuit, *Mr. Justice Manisty* not assenting, but not formally dissenting. *Lord Coleridge C. J.*, after stating the rule of law as above, said, (page 217): "Now it seems to me clear, upon the uncontradicted evidence of the plaintiff himself, that he himself caused the accident by walking straight into a train which he might have seen. There is a double line of rails. He comes first upon the down line on which the train is not coming. There is then the width of the down line, and the interval between the two sets of rails between him and the danger. If he had only taken the precaution of looking to the left along the up line while crossing over this space, he must have seen the coming train. He did not look to see what was plainly to be seen approaching, and in consequence he walked straight into the danger.

The suggested answer to this way of putting the case is as follows: it is said that the plaintiff was not bound to look along the line for two reasons; first, because it was a dangerous crossing and the defendants were bound to whistle, or do something or other by way of warning people of the approach of the train. It is not contended that there was any whistling, and therefore it is said that the defendants were negligent. Secondly, it is said that there was a man there, and it was his duty to warn persons when

he knew that a train was coming, and that if he had warned the plaintiff he would not have come across. Now I am not disposed to lay it down as a general proposition that a train must always whistle on approaching a level crossing \* \* If on the one hand it is said that a person crossing might reasonably look for warning if a train was coming, on the other hand the answer seems to be that the gate-keeper might reasonably rely on a person's looking up and down the line to see if a train was coming before crossing."

In the present case the evidence clearly establishes that the train did whistle at a point over half-a-mile above or west of the crossing, and that the whistle was heard at a point considerably east of the crossing, and so there was the warning that the statute requires, but not given at the time and place required. For the purpose of announcing the approach of the train to one about to cross the railway, this whistle would be reasonably sufficient to put a prudent person on his guard, and the liability of a railway company cannot surely be made to depend on the warning being given at the exact distance and in the precise manner indicated by the statute.

The statute imposes a penalty for omitting to ring the bell or sound the whistle, and also makes the company liable for all damages sustained by any person by reason of the neglect. Under this provision it seems to me that the burden of shewing that the deceased was injured by the omission to ring the bell or sound the whistle must rest upon the plaintiff, and it is not sufficient for the plaintiff to prove the omission and then an injury at the crossing to entitle him to succeed. In the absence of evidence of circumstances that would shew the party injured might reasonably be unaware of the approach of a train through no neglect or fault of his own, there is a failure to shew affirmatively that the omission to ring the bell or sound the whistle caused the damage. In the case of a deaf person the ringing of the bell or sounding of the whistle would give no warning, and it seems to me it would be absurd to say that the company would be liable to such a

person who crossed without using his eyes to assist in avoiding an approaching danger. The omission there to sound the whistle or ring the bell would certainly not be the *causa causans*, and a man with all his faculties about him is not justified in trusting to one sense—that of hearing alone—when by the use of his sight he could easily avoid danger; and if he does so trust he ought to take the consequence of his imprudence, and not shift the burden on to those who did not intend to injure him, but omitted some duty that might or might not have had the effect of preventing the accident.

The language of Denman, J., was even stronger than that of the Chief Justice in *Davey's Case*. It was, p. 219: "I think that the undisputed facts of this case shew that this accident was palpably and unquestionably due to the plaintiff's own folly and recklessness and nothing else. The argument for the plaintiff appears to be that he was not guilty of folly and recklessness for two reasons: first, because there was no whistle to announce the approach of the train, and therefore he was not bound to expect the coming of a train. It seems to me that the argument entirely fails. According to his own account before he attempted to cross the line of rails on which the accident took place he had to cross the down line, and from thence it was possible to see for a long distance along the line either way. He saw that no train was coming on the down line, but he did not take the trouble to turn his eyes and look along the up line. If he had he could have seen three or four hundred yards. It seems to me it is no answer to the contention that the accident resulted from his own folly that there was no whistle, for I do not see that the absence of a whistle played any material part in causing the accident."

The language of both the Chief Justice and Mr. Justice Denman fits the circumstances of this case as closely and clearly as it did the circumstances of the case in reference to which it was used. Here the evidence shews that the deceased was thoroughly acquainted with the locality;



that he was in a position to have heard the whistle of the approaching train when sounded at a distance of 992 yards from the crossing where he was killed, as he must, when that whistle sounded, have been somewhere between two and three hundred yards from the crossing, taking the course he travelled to be laid down on the map filed with any degree of accuracy; and it was not disputed that the plan did correctly shew the course he travelled. Then at a point about 150 or 160 yards from the crossing he passed in his buggy the witnesses Abigail Taggart and Amelia Taggart. These girls were 50 or 60 yards from the rail, in a course nearly at a right angle to the railway. According to Abigail's evidence they were on the road deceased was travelling when deceased passed. They saw the light of the engine, and ran to the track to see it pass. They got to the edge of the ditch at the railway just as the engine passed, and got on the track, when, by the head-light of the engine, they saw the horse going on to the track at the crossing, and the collision take place. It was then dark, and they were 150 or 160 yards from the crossing. It is thus manifest that the engine had a pretty strong light, and that a person at the crossing, if he had looked, must have seen it. The girls saw the light through the trees, and heard the rumbling of the engine. Peter Dickson, a witness for plaintiff, heard the whistling at Lossing's Crossing, when he was at about 80 rods from the crossing where deceased was killed, and heard the whistle afterwards after the accident. He was, as I understand his evidence, standing on the road at the Newport Crossing at the time talking to a person there. He was 80 rods away, and could hear the train approaching.

Edward Everett swore that he saw deceased at about a mile from Cainsville; that deceased followed after him. Witness stopped at Westbrook's hotel, and deceased went up the road towards the track. Witness tied his horse up in the shed, and just as he got through he heard the whistle at about Lossing's Crossing, he thought. He and George Dick, a person with him, when 128 paces from the



stone crossing, heard the whistle, and ran to the track to see the train go by, and got just in time to see it pass. He watched the train, and heard the crash at the crossing below.

It is manifest then that if the deceased had been looking out for the train he must have seen it, and if he did not look out, there being nothing to obstruct his view of the track, shewn by the evidence for the plaintiff, and it appearing from that evidence that the view along the track was unobstructed from the stone crossing to the place of the accident, it was his own fault that he did not see it.

If the deceased had looked for the train he must have seen it, and if he saw it he took the risk of crossing, and thus recklessly rushed to his own destruction. If he did not look for the train, he neglected a precaution that every prudent man would or ought to have taken, and his death was not caused by the defendants' neglect to ring the bell or sound the whistle, but by his own want of care. The facts would thus seem to bring the case clearly within the *ratio decidendi* in *Davey v. The London and South Western Railway*. The fact that in this case a statutory obligation upon the defendants existed, which did not exist in that case, does not interfere with the principle of the decision, and there being no facts or circumstances given in evidence from which the going upon a railway track in front of an approaching train could be assigned to any other cause than a neglect of ordinary care and caution, there was nothing that could properly have been submitted to the jury on the question of contributory negligence.

Whether that question is for the decision of the Court or the jury, must depend upon the circumstances of each case.

In *Davey's Case* in Appeal the Master of the Rolls upon this point thus states his opinion, at p. 71 of the report, 12 Q. B. Div. "In this case I have come to the conclusion that the evidence of the plaintiff himself was so clear that there was no room for any question to be asked the jury, which they were entitled to answer in any but

one way. If that was so, I think all the authorities shew that the Judge was entitled to withdraw the case from the jury. Now in such an action as this the burthen of proof lies entirely upon the plaintiff. There are two things for him to establish, one is affirmative and the other negative. It is for the plaintiff to shew that the accident which happened to him was caused by a negligent act of the defendants or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident."

Here the omission either to sound the whistle or ring the bell did not necessarily cause the accident. It might have happened just as it did if the bell had been rung and the whistle sounded. It at most was, so to speak, a failure on the part of the defendants to furnish a kind of safe-guard which if heeded by the deceased might have rendered the occurrence of the accident less likely. The not providing this safe-guard was negligence on the part of the defendants. The neglect of deceased, if he did so neglect, to look out for an approaching engine, or his attempting to cross the track in the face of it, was negligence on his part, the two combined leading to the deceased's injury, and making that joint negligence which deprives the plaintiff in the opinion of the Master of the Rolls of a right to recover, there being no evidence whatever that after the occurring of the negligence of the deceased any care on the part of the defendants' servants on the engine would have avoided the injury.

The case of the *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155, which has recently been accepted as deciding that the question whether there has been contributory negligence on the part of a plaintiff or not is one of fact for the jury was cited in *Davey's Case* and considered by the Court; and while on the facts there presented it was held the question was for the jury, the case does not go the length of affirming that in no case may that question be taken into the hands of the Court and withdrawn from the jury. I do not think the fact that in *Davey's Case* the plaintiff gave evidence, and admitted that he did not look and might have seen the approaching train if he had looked, makes the case stronger against him than it would have been if it appeared from other evidence that he was in a position to see and did not look for the approaching train, or, seeing it, ran the risk of crossing; and we have Lord Justice Bowen, in the *Davey Case*, asking, as he does at page 77, under the circumstances presented in that case: "Now is it open to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man who never looked at a train which was within a few feet of him?"

If the view of the track had been obstructed by houses along the approach to it, or if the deceased had been a stranger in the place, unacquainted with the locality and ignorant that he was approaching a railway, there might have been something from which a jury could infer that he was not guilty of negligence or want of care in approaching the crossing, and then the omission to sound the whistle or ring the bell, which would be the only means of his knowing that he was in the neighbourhood of a railway crossing, might be said to be the act of negligence that led to the accident, because there would be nothing in the case to shew that he would not have refrained from crossing had he heard the warning.

But in this case there was the knowledge of the deceased of the locality, the alarm remoter than the statute required,

but still the signal that the train was coming, the noise its approach made, the light the engine caused making it visible at a long distance, and nothing to obstruct the view—all circumstances to displace a want of knowledge on deceased's part that the train was approaching when he made the attempt to cross the track; and no evidence whatever to shew that he was not aware of its approach, unless the danger he incurred in attempting to cross is to be taken in the place of evidence of such want of knowledge; and if this alone was sufficient evidence to go to the jury of the absence of contributory negligence, which, as I understand *Davey's Case*, the plaintiff must shew, that case was wrongly decided. It, however, seems to me a decision based on good common sense, that no one should be allowed to impose upon others a liability for injuries that by a reasonable amount of care on his part would be avoided.

If in a Court of Justice the consideration of what would be best in the public interest could be allowed to influence the mind of Judges in determining the rights of individuals, I would say that in my opinion it would be in that interest to require all persons to take extreme care in crossing a railway on a level, and hold them not entitled to compensation if injured while crossing without such care, even though the railway company's servants omitted to perform the obligations the law imposes upon them, leaving such breach of duty to be punished by the imposition of the penalty the statute provides. No one, however, resorts to that method of punishment, which in all probability would be visited to some extent on the defaulting railway servant; and it is simply absurd to suppose that an engine driver could have enforced against him, with his wages at \$30 a month, a verdict for \$4,000 or \$10,000, as the case might be, to the extent of half thereof. The company must suffer the burden, and it has not the public assistance in enforcing the law against its neglectful servants, though it must in common with the public be anxious that all that the law enjoins to secure safety should be rigidly observed. The appeal, in



my opinion, should be allowed, and the order *nisi* for a nonsuit in the Divisional Court made absolute.

ROSE, J.—We are asked to say that this case is concluded by the *Davey Case*, and that because there the plaintiff was nonsuited, on his own admission that he had only looked one way, and could have avoided the accident had he also looked the other way, here the plaintiff must fail because it is alleged the deceased looked neither way.

The answer is twofold.

1. After the plaintiff had satisfied the jury that the defendants were negligent, the onus was then upon the defendants to convince the jury that the deceased was guilty of contributory negligence.

2. The question thus being for the jury, could the learned Judge at the trial have ruled that the evidence offered by the plaintiff shewed that the deceased did not look in the direction from which the train approached? This is on the supposition that the decision in the *Davey Case* is perfectly applicable to cases arising in this country, which, for the reasons given by my brother Patterson, is doubtful.

In *Smith's Law of Negligence*, p. 153, the learned author thus states the rule:

“It is well in considering the doctrine of ‘contributory negligence’ to remember that after the plaintiff has shewn that the defendant has been negligent, then the defendant has to show: 1st, that the plaintiff has been negligent in respect of the matter complained of, and might have avoided the consequence of the defendant’s negligence: 2ndly, that his negligence has been of such a character that the defendants could not avoid its effects.”

The concluding words of the judgment of the Master of the Rolls, as quoted by my brother Patterson, seem to affirm this second proposition.

The case of *Davies v. Mann*, 10 M. & W. 546, will also illustrate the same proposition. On p. 155 of Mr. Smith’s work we find this illustration:—“Suppose the defendant sitting in his trap negligently tied his reins to it and fell



asleep and his horse started off, the plaintiff negligently was playing pitch and toss in the street; the defendant having awoke could by ordinary care avoid running over the plaintiff, but he was too idle to untie the reins." He adds: "the defendant is liable."

Varying the illustration, suppose that instead of neglecting to untie the reins he had neglected to call out and warn the plaintiff, and that if he had so warned him the plaintiff could have heard and have escaped, would he be any the less liable?

It seems to me that the Legislature—recognizing the fact that many of the public, engrossed with anxious thought, afflicted with absent-mindedness, near-sightedness, rendered inattentive to the path upon which they are traveling, by reason of so frequently passing over it that their attention is not called to the particular portions over which they are passing at any particular moment, stand in need of warning, that they are in no particular danger from drivers of horses, who can either rein in their steeds, or give warning by the voice, and that if such drivers are negligent they are held responsible—determined to place the drivers of locomotive engines, who cannot stop the train at every place of danger, under the imperative obligation to give warning to such persons as above described at each and every place where they may possibly be when the train is passing. If such warning voice, either of bell or whistle, is not given, then, in my opinion, the onus lies on the owners of such engine to shew, that though the plaintiff or deceased had been negligent, the negligence was of such a character that the defendant could not avoid its effects.

If the person injured were deaf, then it would clearly appear that such warning sound, if it had been given, would not have enabled the person so injured to avoid the accident, and the deaf person could not thus claim that the accident was caused by the neglect to give the warning.

If, however, the warning was not given, and if given might have availed, it seems to me to be doing away

with the effect of our statute to shift the onus on to the plaintiff of shewing that he was not guilty of contributory negligence, instead of leaving it where the statute has placed it, viz., on the defendants. If the law was as is contended here, viz.: that the onus was on the plaintiff, not only affirmatively to shew negligence, but also to negative contributory negligence on his part, I might be able to understand the logical force of the fourth reason of appeal, viz.: "If the deceased attempted to cross the railway track without looking for the locomotive, he was guilty of contributory negligence. If, on the other hand, he looked he must have seen the locomotive, and in that sense was guilty of contributory negligence, and so in either event there was nothing to submit to the jury, but the Court should have withdrawn the case from the jury or directed a judgment for the defendants."

The result of such reasoning would, I fear, prevent in most cases recovery against the defendants, when the person suffering the accident was killed instantly, and thus unable to give evidence.

Mr. Bethune admitted that the only evidence as to whether the deceased looked or not was that of Amelia Taggart, pp. 22-3, of the appeal book. She said on cross-examination, line 40, that he was looking "right ahead, right straight ahead."

Q. If he was looking in the same direction as you he would have seen it? A. There was a house.

Q. That was only an instant? A. Yes.

Q. Don't you think he could have seen it as well as you? A. There was quite an orchard, he was in a buggy. I cannot say if he would or could have seen it.

Q. He would be higher up than you, and he would have as good an opportunity as you? A. I don't think so, he was looking between the orchard and the house.

Q. That would be only an instant, there is only one house? A. Yes.

Q. Not a very big house? A. No.

Q. Once he got past that he would have an opportunity of seeing the engine? A. I suppose he would.

Can one reasonably say that the *only* conclusion to be drawn from this evidence is, that the deceased did not look in the direction from which the train was coming? Might it not have been that as he approached he did look, did not see the train (the jury say it was "going unusually fast," that the bell was not ringing, nor was the whistle sounded), and not hearing the bell or whistle, drove on in fancied security until struck down and killed.

As to this issue, the company were in the position of plaintiffs. Could the Court say that a jury were perverse because on such evidence they refused to be satisfied that the deceased did not look? I am unable to accede to such a contention.

I agree that the appeal must be dismissed, with costs.

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## BURNS V. YOUNG.

*Half breeds' rights—Transfer of scrip.*

The plaintiff had agreed with the defendant to purchase the claim to land scrip in Manitoba of a half-breed, and defendant procured to be assigned to plaintiff the claim of one alleged to be a child of a half-breed. This proved to be erroneous, and the scrip which had been issued to him was worthless.

*Held*—affirming the judgment of the County Court—that the plaintiff was entitled to recover from the defendant the amount paid by the plaintiff for the purchase of the so-called right; the plaintiff to assign to the defendant, *quantum valeat*, the land scrip he had received.

THIS was an appeal by the defendant, from the judgment of the senior Judge of the County Court of York, refusing a motion to set aside a verdict or judgment entered for the plaintiff. The action was instituted by the plaintiff against the defendant, for not transferring to the plaintiff a claim of a half-breed in Manitoba, or returning the sum of \$180, the price paid therefor, and an additional sum of \$10, which the plaintiff advanced to pay for the registration of the papers connected with the sale.

The action came on to be tried before the learned Judge, without a jury, in March, 1883, when judgment was reserved; and, subsequently, on the 26th of April following, judgment was given by the learned Judge for \$180.

The other facts appear in the judgment.

The appeal was argued before this Court on the 30th May, 1884.\*

*A. Hoskin*, Q. C., for the appellant.

*J. R. Roaf*, for the respondent.

For the appellant, it was contended, under the circumstances appearing in the case, that he was not bound to warrant the title or to make good to the plaintiff any loss he might sustain in the event of the same proving defective. The bargain between the parties was that Young should obtain for plaintiff the transfer of the right of a half-breed

\**Present*.—HAGARTY, C. J. O., BURTON and PATTERSON, JJ. A.

to a portion of the lands set apart for those persons in the Province of Manitoba. This, the evidence shews, he did procure, and unless the Court holds that he was bound to make good the title he had, by procuring such transfer, performed his part of the contract. It is true the plaintiff alleges that the claim purported to have been transferred to him was obtained by Cook, the alleged holder of such right, by fraud and deception. The evidence, however, is insufficient, as it is nothing more than hearsay, being of statements from the Crown lands office in Ottawa. Besides, this would raise a question of title to lands, which it was submitted was not within the jurisdiction of the County Court.

For the respondent, it was insisted he was entitled to recover, there having been a total failure of consideration for the amount of money paid by plaintiff to the defendant: that it could not be said that any question arose in this case in which the title to lands came up; it was a question if the claim was in existence, or not a claim at all; the ground of relief was that plaintiff has paid his money for something which he had never obtained. What the defendant wishes to force upon him is, an alleged claim which the department refuses to recognize. The plaintiff is entitled to a claim which will entitle him to a share of the lands, and is not bound to take a source of litigation with the Government.

September 19, 1884. The judgment of the Court was delivered by—

PATTERSON, J. A.—This is an appeal from the County Court of the county of York. The defendant who appeals complains of a finding against him by the senior Judge. We are at the disadvantage of not having any finding of facts by the learned Judge, who tried the case without a jury, and who contented himself with simply entering a verdict for the plaintiff for \$180.

It is also somewhat difficult to gather from the pleadings what the precise dispute was understood by the parties to



be, and it cannot be truly said that their evidence made it much more certain.

In his statement of claim the plaintiff alleges that he gave the defendant \$180, for which the defendant agreed to sell him a half-breed claim in the parish of St. Francois Xavier, in Manitoba. In his evidence he says he understood he was buying something which the defendant had to sell, not that he was employing the defendant as his agent to purchase a claim for him. Yet he goes on in the third paragraph of his statement to charge that the defendant has not *procured* and transferred to him a half-breed claim as agreed, which puts the matter in the shape sworn to by the defendant, who says he only acted as broker, and not as vendor.

The plaintiff thus putting the retainer or bargain both ways in his pleading, and his oral evidence moreover being inconsistent with some documentary evidence; and the defendant, although clear enough as to the character in which he dealt with the plaintiff, knowing nothing of his own knowledge of what was done in Manitoba, where the transaction was carried out by a Mr. Hunter, whose evidence is eminently unsatisfactory, we must, in the absence of any finding of facts by the learned Judge, see what we can make of any evidence which seems to be reliable.

Both sides agree that the plaintiff was to get something for the money he gave the defendant; and whether he was to get it from the defendant as vendor, or through the defendant as broker, he was to get something to entitle him to land in the right of some half-breed.

There are two statutes under which these claims are allotted.

The Act of 1870, 33 Vict. ch. 3 provided, by sec. 31, for the appropriation of 1,400,000 acres for the benefit of the families of half-breed residents of the territory now constituting Manitoba. Under regulations to be made by the Governor General, the Lieutenant-Governor was to select lots or tracts and divide the same among *the children of the half-breed families* residing in the province at the date

of the transfer of the lands to Canada, which occurred on 15th July, 1870; and the same were to be granted to the said children respectively in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council should, from time to time, determine.

This statute, it will be observed, provides only for grants to *the children* of half-breed families.

The Act of 1874, 34 Vict. ch. 20, was passed to provide for *heads of families*. Sec. 1 enacted that each half-breed *head of a family* resident in Manitoba on 15th July, 1870, should be entitled in the discretion of, and under regulations to be made by the Governor General in Council, to receive a grant of 160 acres of land, or to receive scrip for \$160, which should be receivable in payment for the purchase of Dominion lands.

And sec. 2 defined "half-breed heads of families" as including mothers as well as fathers.

The defendant, in the course of his correspondence with the plaintiff, informed him that Jeremiah Cook was the name of the half-breed whose claim was purchased for him, and it is proved that a deed was taken from a person named Jeremiah Cook, acting by Robert Cook as his attorney.

This deed is in evidence. It bears date 22nd March, 1880, and is from Jeremiah Cook of the parish of Poplar Point, in the county of Marquette West, in the province of Manitoba, to the plaintiff. It recites that Jeremiah Cook being one of the *half-breed children* residing in Manitoba at the time of the transfer thereof to the Dominion of Canada, and as such being entitled to a grant of a portion of the ungranted lands of the province, had agreed with the plaintiff for the absolute sale and transfer of the same to him for the price of \$240, and then grants, &c., all his right, &c., of, in, to, and out of "the said land to which the said party of the first part may become entitled as such half-breed in the said Province of Manitoba, wheresoever the same has been or may hereafter be allotted or determined, with all the rights, powers, and privileges of the

said party of the first part as to choice of location and otherwise in respect of such land."

This was accompanied by a power of attorney from Robert Cook, attorney for Jeremiah Cook, of Rockwood, in the County of Lisgar, in Manitoba, to Matthew T. Hunter, of Winnipeg, to apply for and receive from the government of the Dominion of Canada, or their proper officers in that behalf, "the patent which I am entitled to receive under the provisions of the Statutes of Canada; and to do and perform all things that may be necessary to obtain the same; and upon the receipt thereof to give and execute such receipts and acquittances therefor as may be required; and to sign, seal, execute, and deliver as my act and deed in my name, all conveyances necessary to act in my person the fee simple of the said land." I have correctly extracted this last unintelligible sentence. The document is signed "Jeremiah Cook by his attorney Robert Cook," but in its terms it authorizes acts only in the name and place of Robert.

There is in evidence a power of attorney from Jeremiah Cook to Robert, dated 16th July, 1877, empowering him to receive any allotment of lands made to Jeremiah as one of the children of half-breeds, and to sell and convey the same. It gives very full powers to deal with any such allotment, but contains no power of substitution.

Then it appears from copies of documents certified from the Dominion Lands Office at Ottawa, that on 28th June, 1878, Robert Cook made an affidavit that Samuel Jeremiah Cook, his brother, of Prince Albert Mission, formerly of the Parish of Poplar Point, was entitled to participate in the 1,400,000 acres: that he was born in 1842; his father being Samuel Cook and his mother Josephete Short; the mother being a half-breed head of a family on 15th July, 1870, and that S. J. Cook was not the head of any family on 15th July, 1870.

Upon this affidavit it appears, from returns certified as evidence, that an allotment was made, numbered in the books of the department 1300, to Jeremiah Cook (not

*Samuel* Jeremiah, as in the affidavit) of St. Francois Xavier and Baie St. Paul, yeoman, 240 acres of land, being the south half of the south half of section No. 2, in the 8th Range of the 9th Township, and the north half of the north-west quarter of section 35, in the 8th range of the 8th township in the parish of St. Francois Xavier and Baie St. Paul, the date of the agent's return recommending the grant being 27th and 28th February, 1880, and the number of the grant 1011.

No patent was issued for this land.

Evidence was given that this grant had been cancelled in December, 1880, on the books and records of the department in consequence of the discovery that Jeremiah Cook had, by an affidavit made by himself on 29th September, 1875, claimed as a *half-breed head of a family*, and in that character received scrip for \$160.

We are not required to discuss any technical questions touching the admissibility of the evidence of the cancellation of the grant of 1880, because the defendant has no evidence of the grant which can be separated from the evidence of the cancellation.

If it were necessary to consider whether that grant were still operative, notwithstanding the cancellation of the office entries, we should require more evidence than we have of the fact of the grant having been made. What is called a grant I understand to be merely a recommendation for a patent. Under the Act of 1870 the half-breed child was to *receive a patent*, and I do not observe any provision for his receiving any document as evidence of his right to a patent, nor is it asserted that Cook, or any one for him, ever did receive such a document.

If the so called grant vested in Cook any right, it was a right to the specific lands mentioned in the returns, but that is not what the deed professes to convey, except so far as it refers to the right to land, "wheresoever the same *has been*, or may hereafter be, allotted or determined." To bring the specific lands under this reference, a binding allotment would have to be shewn entitling to the issue of a patent.



The plaintiff was certainly entitled to receive from the defendant something more than a right to litigate with the Crown the question whether Jeremiah was entitled as a head of a family under one statute, or as a child under the other, a question which would perhaps admit of some debate. Yet that would appear to be all that the defendant procured for him.

The defendant explains in his evidence the distinction between *scrip*, to which heads of families are entitled, and *claims*, which he says are what children receive.

I do not understand that the children receive any voucher until the patent issues; and as no document of title was assigned to the plaintiff, but the assertion is that a *claim* was bought for him, the onus is on the defendant to shew that a valid claim existed. The plaintiff's case was that he had paid his money and received nothing. That was sufficient, if unanswered, to entitle him to recover back his money. The answer is that a *claim* was bought for him in Manitoba, where the papers had remained. But when they are produced they are inoperative to establish the defence without further evidence that a *claim* existed which this transfer put the plaintiff in a position to realize, in other words, that some right to lands allotted or unallotted was conveyed to him. In place of that it appears that the claim asserted is that of a man who had several years before received scrip as the head of a family, and who is now attempting to assert that his right was as a child, and in that character to claim a further grant.

The case is different from that of a man who chooses to pay his money for a chose in action, or even for a claim that is not supposed to be founded on any legal right, and to take the risk of what he can make of it. Here the defendant is asserting a right to force this deed upon the plaintiff as a conveyance of a claim.

Apart from the failure to establish the existence of a claim in Jeremiah Cook, or the recognition of one by the Crown on which the plaintiff could insist, there is a good deal in the evidence to raise doubts of the *bona fides* of the



dealings of the persons in Manitoba, whose names appear in the matter. I do not here allude to the defendant himself, because he shews that he had no personal knowledge of what was done, but relied altogether on others.

Jeremiah Cook, by his affidavit made on 29th September, 1875, on which he obtained the scrip as a head of a family, swore that he was the head of a family consisting, on 15th June, 1870, of himself and wife. Robert Cook swore in his affidavit of 28th June, 1878, that Jeremiah was not head of any family on 15th June, 1870; and in his evidence taken in this action he deposed that Jeremiah was not married until after that date.

The scrip was delivered, as certified from the Government office, to Mr. Joseph Ryan, and receipted by him as attorney for Jeremiah Cook, and he filed a power of attorney from Jeremiah Cook dated 13th October, 1876. Yet we find Jeremiah, on 16th July, 1877, giving a power of attorney to Robert to receive his allotment of land as a child of a half-breed family; and Robert says he purchased the claim from Jeremiah at that time, and satisfied himself before he bought it that it was all right. He does not explain what was the nature of whatever inquiries he made, nor does he say that he was not aware of the previous issue of the scrip. This may of course be owing merely to there having been nothing to direct the attention of counsel to the subject; but the result is that while there arises some suspicion that Jeremiah must have been intending to claim in both characters, as head of a family and as a child of a family, possibly construing the statutes as giving him the double provision, there is nothing to negative Robert's complicity with such a scheme. It is not easy to believe that Robert, who tells us that Jeremiah went with him to the land office in Winnipeg in 1877, and got his name entered on the supplementary list, can have been kept in ignorance of his brother's former application, and of the issue of the scrip to him the previous summer.

Then looking at the evidence of the witness Hunter

taken under commission, and which I have already characterized as unsatisfactory, we find him giving the following, as his direct account of his share in the transaction :

“I received a letter from Mr. Young. After the receipt of that letter I purchased the claim of Jeremiah Cook. I purchased it from Jeremiah Cook. I purchased from Robert Cook, who held a power of attorney to sell from Jeremiah Cook.” And further on: “I do not remember what amount was paid Robert Cook at that time. I have no idea what amount was paid—anything I did pay was paid as agent for Mr. Burns”; and so on—disguising, as far as he could, the fact that afterwards clearly appeared, that he did not buy from either Jeremiah or Robert Cook, but from a Mr. David McArthur, who had bought two years earlier from Robert Cook for \$75, and who sold to Hunter for \$120, not \$240 as expressed in the deed made to the plaintiff.

Now observe these dates. David McArthur swore that when he bought from Cook he took an assignment to himself, which he did not register. It was not produced, but the assignment taken direct from Cook to the plaintiff being witnessed by McArthur might perhaps estop him from setting up the conveyance to himself. The deed to the plaintiff is dated 22nd March, 1880; the affidavit of Robert Cook was made on 28th June, 1878. McArthur must have bought at or about that date; and that he had no other evidence of the existence of any claim, except that affidavit, appears from the fact that the agent's return, which first recognized the claim asserted by that affidavit, bears date 28th February, 1880. The defendant tells us that as early as November, 1879, the plaintiff had applied to him to procure a half-breed claim for him. We have before us the defendant's letter of 6th March, 1880, advising the plaintiff that his claim was being purchased, and asking him for money, in response to which the plaintiff paid him \$180 on 11th March. The inference is a natural one that the action taken in 1880 upon Robert Cook's affidavit of 1878, was taken with a special view to this transaction;

and it also looks very much like a further move in the experiment upon the statutes which seems to have been commenced when Jeremiah gave the power to Robert to claim in his name in one character, when he had himself already successfully represented himself as entitled in the other.

The defendant, whose evidence seems to have been given very candidly, and by whose explanations of matters connected with the land office at Winnipeg and otherwise we have been assisted, appears to have been under a misapprehension when he said in his evidence at the trial, if he is correctly reported, that the document shewed that this particular claim<sup>e</sup> had stood on the books at Winnipeg without fault being found for three years. He explains that a register is kept of passed claims, claims acknowledged by the commissioner or by the agent appointed so to do; and that there are also entries of applications for claims which are not in that register. He did not profess to speak from any search made by himself when he said this claim had stood for three years without fault being found. I do not understand that it can have been on the register before the 28th of February, 1880, which is the date certified as that of the agent's return. If Jeremiah's name was on the books earlier as a claimant it can only have been from the time he went with Robert to the office on or about the 16th July, 1877, when he gave Robert the power of attorney. Any entry made at that time can only have been as an application, not as a registered claim, and so could afford no voucher of the validity of the claim.

Upon the question of the validity of the claim, we see no reason to doubt the correctness of the view taken in the department that the same man could only claim one allotment; but it is not for us, at present, to decide judicially that Jeremiah could not, by force of the statutes, claim in both characters, or if in only one, then which claim was the valid one. It is enough that a claim which can only be asserted by litigation, and *a fortiori* one which may not

even be susceptible of litigation, cannot be forced upon the plaintiff as the consideration for which he paid his money. On this ground the defendant fails.

We do not interfere with the amount of the verdict, although the plaintiff paid the defendant \$10 more than the \$180.

It is only just that the plaintiff shall re-assign, *quantum valeat*, whatever was assigned to him. Indeed the defendant states that some such arrangement was in his contemplation when he was served with the writ of summons in this action. He says he had understood from Mr. Hunter that Mr. McArthur was willing to pay the money, and take a re-assignment. It is to be regretted that this had not been done and this litigation avoided. That it has been otherwise may possibly be due to some misunderstanding, as Mr. Roaf, the plaintiff's solicitor, seems to have understood that an offer on the plaintiff's part to accept \$160 had been declined.

It may not be unfair to refer to what the defendant says respecting McArthur's willingness to repay what he received, as corroborative of the view we have taken of the dealings in which he was concerned, or at all events as indicating that he had satisfied himself that the transaction was one which could not be insisted on as against the plaintiff.

The appeal must be dismissed, with costs, with, however, the addition to the judgment, that the plaintiff shall execute an assignment to the defendant or his appointee, if the defendant cares to have one, and tenders it for execution.

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## ELLIS v. ABELL.

*Sale of machine—Warranty—Breach—Written contracts—Parol evidence of warranty—Quantum of damages.*

The defendant was a manufacturer of steam threshing machines, which were recommended as being safe from fire; that the engine would not throw out sparks, and that the separator, which was sold and used therewith, would not throw out grain in the chaff, and that altogether these were the best threshing machines in the world. The plaintiff alleged that after hearing these recommendations he sent a written order to the defendant for a steam engine and separator, which when used proved defective, the engine throwing out sparks and the separator wasting the grain by throwing it out with the chaff; and he claimed to have the contract of purchase rescinded and the notes given by him in payment for the machine returned; and \$300 damages.

The Judge at the trial having ruled that the plaintiff could not rescind the contract, but could only recover, as damages for breach of warranty, the difference in value between the machine contracted for and the one which was delivered—the jury found (in answer to questions) that there was a warranty which had been broken and that by such breach the plaintiff had sustained damages to the amount of \$500.

On motion to a Divisional Court: (1) for a new trial on the ground that the findings were against evidence and for excessive damages, or (2) to enter judgment for defendant on the ground that the contract was in writing and therefore parol evidence of warranty was inadmissible. The Common Pleas Division refused a rule; and the defendant appealed as to the principal question, viz: the admissibility of parol evidence.

*Held* by HAGARTY, C. J. O., and ROSE, J., that parol evidence was properly admitted—that (as held in *Bennet v. Tregent*, 24 C. P. 565, approved of in *McMullen v. Williams*, 5 A. R. 518), it was a question of fact for the jury whether the written order embodied the whole contract, and therefore their finding on this point was conclusive.

*Held* by BURTON, J. A., and CAMERON, C. J. C. P., that parol evidence of a warranty was improperly admitted.

*Per* BURTON, J. A. (1) When a proposal is made in writing by one party and accepted *ad idem* by the other, either verbally or by acting upon it, the contract is a written one. (2) If the writing embodies the contract, the Judge is bound to exclude all evidence to shew that the real intention of the parties was different from that which appears in the writing. (3) A warranty, though a collateral undertaking, is part of the contract of sale, and, if the contract is in writing, antecedent representations, not embodied in the written contract, are not warranties, and cannot be proved unless it is shewn that they were fraudulently made and the contract was so induced. (4) If the contract is not reduced to writing, or if, though there is a written document, the evidence leads the Court to infer that the writing does not contain the whole agreement, it is for the jury to say whether antecedent representations did or did not amount to warranties. In this case there was no admissible evidence of a warranty, and the judgment should be for the defendant.

*Per* CAMERON, C. J. C. P., the plaintiff's claim on the pleadings was for breach of a contract not proved by the evidence, and no amendment should be allowed to change it into an action for breach of warranty; but there should be a new trial.

As to the question of damages.

*Per* HAGARTY, C. J. O., and ROSE, J.; the damages claimed in the pleadings were claimed upon the basis of a rescission of the contract and



return of the notes. The damages awarded were for a breach of warranty, the plaintiff keeping the machine and paying for it; and there was evidence to support the finding of the jury as to damages.

*Per CAMERON, C. J. C. P.* There was no evidence from which the plaintiff's damages for breach of warranty could be reasonably ascertained, and for this reason also there should be a new trial.

The Court being equally divided, the appeal was dismissed.

THIS was an action for breach of contract tried at the Barrie Spring Assizes, 1882, before Patterson, J. A., and a jury.

The statement of claim alleged that on or about 24th December, 1880, the plaintiff, a labourer residing in the Township of Essa, in the County of Simcoe, agreed to buy from the defendant, an agricultural implement manufacturer, carrying on business in the Village of Woodbridge, County of York, for the price of \$1,075, a steam threshing engine and machine, of his (the defendant's) own manufacture, which said engine and machine would do good work, and would not throw fire or emit sparks of fire that would endanger buildings or other inflammable materials that might happen to be adjacent or in proximity to the said engine and machine while in operation: that on or about the 1st July, 1881, the plaintiff and one James Findlay, in payment for the said engine and machine, gave to the defendant three joint and several promissory notes, each for the sum of \$358.34, due on 1st February, 1882, 1883, and 1884, with interest thereon at 7 per cent. per annum: that the machines were delivered on or about the 14th day of said month of July; and that after the delivery of the said engine and machine, the plaintiff and the said Findlay used and had the said engine and machine in operation in the threshing business, and found that it did not do good work, and did throw fire and emit sparks of fire, whereby adjoining buildings and other adjacent inflammable materials were endangered; whereupon, and at different times since, the plaintiff and the said Findlay made complaints of the said defects in the said engine and machine to the defendant, and offered to return to the defendant, and requested and demanded him to receive

and take back the said engine and machine, and return the said notes ; but the defendant refused to take the said engine and machine back and return the said notes. That in consequence of the said defects in the said engine and machine, many persons, fearing destruction of their property and buildings by fire, through the employment of the said engine and machine, and also knowing of the inferior work done by the said engine and machine, refused to employ the same to do their threshing, whereby the plaintiff suffered severe losses through failing to obtain such work ; that on several occasions, owing to the said defect in said engine and machine of throwing fire or emitting sparks of fire, adjacent buildings and other inflammable materials took fire from the said engine and machine, and were totally or partially destroyed, whereby the plaintiff and the said Findlay were compelled to pay the owners of such property who had employed them or him to thresh, considerable sums of money in compensation for such destruction of property. And the plaintiff claimed : (1) Damages to the amount of \$300 ; (2) A return of the said three promissory notes or their value ; (3) \$19.20 as a return of freight paid by the plaintiff on said engine and machine.

The defendant by his statement of defence set up that the contract of purchase was in writing ; that the plaintiff had given his notes for the purchase money, and had kept and used the said engine and separator for a long time, and made no complaint in regard to the same, but, on the contrary, expressed himself to the defendant as perfectly satisfied with the same ; and the defendant denied that the said engine and separator were not capable of doing good work, and of being used without throwing fire and emitting sparks of fire, so as to endanger adjacent buildings or inflammable materials, provided the said engine was kept in proper order : that if the said engine and machine, while being used by the plaintiff, did not do good work, and threw fire and emitted sparks of fire so as to endanger adjacent buildings or inflammable materials,

it was owing to the negligence on the part of the plaintiff, and to his not employing proper skill and care in keeping the said engine in proper order: that by the said agreement it was provided that the property in the said engine and separator was not to pass to the plaintiff until full payment of the price and of any obligation given therefor, or for any part thereof; and that if any default in payment was made, the said defendant might resume possession and sell the said engine and separator, to pay the unpaid balance of the price, whether due or not: that one of the notes before mentioned, viz., that payable on the 1st day of February, 1882, was overdue and unpaid; and the defendant, by way of counter claim, claimed to have the said engine and separator sold to pay the unpaid balance of the price thereof, and to have the same delivered up to him for such purpose, or sold under the direction of the Court; and also, to have judgment against the plaintiff for payment of the amount thereof, and the interest, at 7 per cent. per annum, secured thereby.

The evidence given at the trial shewed that the plaintiff had given an order for the machine on a printed form, as follows:

“WOODBRIDGE AGRICULTURAL WORKS.

“Woodbridge, Dec. 31st, 1880.

“To MR. JOHN ABELL: Sir—Please sell us one of your Triumph engines and Paragon separators, without trucks. The engine to be covered, separator to be like Grose’s, with folding corners, angle pulley, four concave levers, belt tighteners, long elevator, &c., and have the same ready about the 15th June next, to be delivered at Woodbridge station, for which we agree to pay by note when ready for delivery, the sum of \$1,075, payable as follows: one-third, 1st February, 1882; one-third, 1st February, 1883; one-third, February, 1884; each payment with interest at the rate of seven per cent. per annum.

“We further agree to furnish satisfactory security if required. We are to have immediate possession and use of the articles, but the property therein is not to pass to us until full payment of the price and of any obligation given therefor, or for any part thereof. If we make any default, or if the property is seized for debt or rent, you may resume possession and sell the same to pay the unpaid balance of the price whether due or not.

“Yours truly,

“WILLIAM MAXWELL ELLIS,

“JAMES FINDLAY.

“Witness: T. R. PURVIS, Barrie.”

The engine and machine had been delivered to him about the middle of July, 1881, and had been used by him from about the middle of August until December 15th of that year, when after several complaints to the defendant's agent at Barrie, and two unsuccessful attempts by the defendant to remedy the defects complained of, the plaintiff abandoned the use of the machine, and placed the matter in the hands of his solicitors, who wrote the defendant as follows :

“BARRIE, December 15th, 1881.

“JOHN ABELL, Esq.,

“Woodbridge P. O.

“Mr. Maxwell Ellis has called upon us regarding the steam engine and thresher purchased from you. The fire flies all over the premises, and the farmers refuse to employ Mr. Ellis. The last place he threshed he with great difficulty prevented the barn from being burned. Your machines are guaranteed not to throw fire. Mr. Ellis has complained to your agent, Mr. Purvis, several times, but can get no satisfaction. Have you any proposition to make, and can you make the machine comply with the guarantee ?

“Yours,

“LOUNT & LOUNT.”

To this letter the defendant replied as follows :

“WOODBRIDGE, 27th December, 1881.

“To Messrs. LOUNT & LOUNT,

“Barrie.

“In reply to yours of the 15th inst., I beg to say I think Mr. Ellis is rather unreasonable in his complaint. The engine was thoroughly tried before he got it, and was delivered to him in good order ; and after a long trial he was perfectly satisfied, and gave his testimonial to that effect. Now, when his note is coming due, and after he has used it the whole season, he has got to complain.

“The engine is perfectly safe from danger of fire if he keeps it in order, and I sent him a Fire Insurance License for that engine, showing that it had been subjected to a very severe trial by the Insurance Inspector, and found safe. Now the matter rests with him to keep it in order.

“Yours truly,

“JOHN ABELL

“Per H. G.”

Whereupon the action was brought.

The plaintiff, in cross-examination, admitted that on or about the 8th of November, and after he knew the machine to be defective, he had given the defendant's agent at Barrie a testimonial as follows :



"BARRIE, November 8th, 1881.

"To Mr. JOHN ABELL,

"Woodbridge.

"*Dear Sir*,—In answer to your enquiries how I like the Triumph Engine and Paragon Thresher, would say, I like them well. The engine runs like a charm. No trouble getting up steam—easy on the wood-pile. I threshed over seven hundred bushels of grain for Thomas Lucas, of Innisfil, with less than half a cord of two-foot wood. As for the Paragon, I think she has no equal for fast and clean threshing. For James Lyons, of Essa, I threshed sixteen hundred bushels of wheat and barley in less than fifteen hours in the short days of October. I purchased the Triumph Engine and Paragon Thresher from your agent, T. R. Purvis, of Barrie; and to make a long story short, I intend to have another Triumph Engine and Paragon for next year, for the present one has been satisfactory to my customers and to myself. You may use this as you think best. In conclusion, I would say to all threshers, if they want a first-class machine, buy the Triumph Engine and Paragon Thresher.

"Yours truly,

"MAXWELL ELLIS,

"Egbert P. O.

"You can fix this up to suit yourself. M. E."

But on re-examination he said:

"It was Tom Purvis that obtained that testimonial. We were walking along the street, and he was at me for a testimonial. He said, 'You promised me a testimonial, and you must give me one before you leave the place.' I think that was the time he came to Cooper's, and he said he would not come out till I gave it to him. I told him about the threshing at Lyons's, and I told him about threshing 700 bushels at Lucas's with half a cord of wood. He put that down and wrote it himself."

Q. "Why did you sign it?" A. "I was in a fix, and I thought from the way he talked to me that it was going to do him a great deal of good; that it was a great favour, and would help him to sell machines."

At the close of the case the learned Judge ruled that the contract having been in part performed, there was no right of rescission, and the plaintiff's claim must be limited to damages for breach of warranty. He then submitted to the jury four questions, which were answered as follows:

1. Was there a warranty of the machine which has been broken? A. Yes.

2. What was that warranty? A. That the machine would do good work, and that the engine would not throw sparks.

3. How was it broken? A. By the machine not doing good work, and the engine throwing sparks.

4. Damages? A. \$500.



The motion for judgment was adjourned to a subsequent day, and on May 17th, 1882, *W. Lount*, Q. C., moved for judgment for plaintiff for \$500 on the findings of the jury, and *C. R. W. Biggar*, contra, moved to enter a judgment of nonsuit as between the respondent Ellis and the appellant, and for judgment for the appellant on his counter claim.

On May 19th, 1882, the learned Judge delivered the following judgment:

The plaintiff negotiated with one Purvis, who was an agent of the defendant, for the purchase of a steam engine and a threshing machine; and having decided to buy, he signed an order upon a printed form, provided by the defendant, for one of the defendant's "Triumph" engines, and one of his "Paragon" separators, at a certain price, viz: \$1,075, to be paid by notes. The Triumph Engine and the Paragon Separator are machines of a certain description, which the defendant makes and advertises for sale by the circulation of pamphlets in which they are described, and by other means. The machines were delivered, and were used by the plaintiff in threshing at the farms of a considerable number of farmers. The steam engine had, as one of its distinctive features, a spark arrester, which is a contrivance intended to insure safety in using the engine in the vicinity of barns and places containing combustible materials. The plaintiff complains that this part of the machine was inefficient, and that it had been warranted to be otherwise. He also complains that the separator was faulty in its operation, and caused the waste of much grain, contrary to what he alleged was warranted by the defendant through Purvis, his agent.

The order signed by the plaintiff has no allusion to any warranty. Nothing was signed or written by or on behalf of the defendant.

Mr. Biggar objected to the reception of oral evidence of the warranty, as adding by parol a term to the written agreement, and he has referred me to several authorities in support of his contention on that point. I have looked at those cases, as well as at cases cited to me by Mr. Lount, for the plaintiff, and at others. I am of opinion that the evidence was admissible. I do not consider that the order signed by the plaintiff either was or was intended to be anything more than an order for the specific description of

machines at the specified price and on certain terms, by which the plaintiff was to be bound. It never embodied a completed contract, for the defendant never was bound; and it did not even purport to speak for the defendant. There was nothing in my judgment to prevent evidence being given of any terms of the bargain not inconsistent with those set down in the order. Several of the cases cited to me bear out this view. I may particularly refer to *Gordon v. Waterous*, 36 U. C. R. 321; *Northwood v. Rennie*, 3 A. R. 37; *Allen v. Pink*, 4 M. & W. 140; *Erskine v. Adeane*, L. R. 8 Ch. 756; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Mann v. Nunn*, 43 L. J. C. P. 241; *Lindley v. Lacey*, 17 C. B. N. S. 578.

It was further objected that, assuming the admissibility of parol evidence, there was no sufficient evidence of warranty, and that therefore the plaintiff ought to have been unsuited.

I have no doubt that there was evidence of warranty of the steam engine, both from what was said of statements or representations made by Purvis, and from the correspondence in which that warranty was distinctly asserted on the part of the plaintiff, and was not denied by the defendant, who only asserted the perfect construction of the machine. He contented himself with denying the breach of the warranty, which the plaintiff asserted had been given, but did not dispute the giving of the warranty.

The correspondence contained no allusion to a warranty of the separator, and so afforded evidence against the plaintiff, to which, however, the jury did not attach conclusive weight. But I cannot say there was no evidence of warranty of that machine. There was direct evidence given by the plaintiff himself of representations made by Purvis concerning the separator, the effect of which was a proper matter for the consideration of the jury. Whatever, therefore, may be said against the finding, on the score of its being insufficiently supported by the evidence, I cannot say there was no evidence. Even if I thought otherwise, I could not now, on that ground, disturb the verdict or apportion the damages. It would probably have been better, in view of these objections, to have taken the verdict separately in respect of each machine. Something of that kind was suggested after I had charged the jury, but with a different object. I waited until the jury returned their answers, and then observing that they found a separate warranty of each

machine, the suggestion which had been made seemed to be met. The idea of having the damages assessed separately did not occur to me and was not suggested. Under the circumstances, if it should be held by the Divisional Court that a verdict for plaintiff would have been proper in respect of the steam engine, but not in respect of the separator, I suppose a new trial must be the result. I do not think I could dispose of the case under rule 321, as was done in *Hamilton v. Johnson*, L. R. 5 Q. B. D. 263, to which Mr. Biggar referred me.

I decide that the plaintiff is entitled, upon the facts found by the jury, to recover \$500 for breach of the alleged warranties.

The defendant's counter claim has now to be considered.

The plaintiff and one Findlay gave three notes, dated 1st July, 1881, and payable with seven per cent. interest thus: \$359 on 1st February, 1882; \$358 on 1st February, 1883; \$358 on 1st February, 1884. The first note was due when the statement of counter claim was filed, but was not due till after the commencement of the action. The others are not yet due. Findlay was made a defendant to the counter claim and served with due notice thereof, but did not appear. The defendant sets out, and the fact is, that an agreement was embodied in the order given by the plaintiff, that the property in the engine and separator was not to pass until full payment of the price; and that, in case of default, the defendant might resume possession, and sell the machines to pay the unpaid balance of the price, whether due or not. And he asks for an order for the delivery to him of the machines, or for a sale of them under the direction of the Court.

Mr. Lount opposes that application on several grounds. I do not think it necessary to consider whether, even if default were clearly shewn, the Court would, in an action of this kind, interfere as asked by the defendant; because I cannot, under the circumstances, hold that any default has been made. The counter claim is advanced primarily as an answer to the plaintiff's demand. No doubt the defendant might have a judgment for substantive relief in case it appeared that after setting apart so much of his claim as was sufficient to meet that of the plaintiff, he was entitled to something further; but he does not succeed in doing that. The only amount due to him on the day on which the damages were assessed, viz.: the 28th of April, 1882, was \$377.65, being the first note and interest from

1st July, 1881, which falls short by \$122.35 of satisfying the damages.

The plaintiff is, therefore, entitled to judgment for the sum of \$122.35, and to delivery up of the first note.

It would not, however, be just that the plaintiff, who has not paid his purchase money, should receive the sum of \$122.35 in cash, if the defendant prefers to let it go in further reduction of what remains unpaid. The whole debt is *debitum in presenti*, although *solvendum in futuro*.

If, therefore, the defendant shall indorse upon the second note in reduction of its amount and as of 28th April, 1882, the sum of \$122.35, and shall satisfy the Deputy Clerk of the Crown at Barrie of the same having been done before or at the time of entry of judgment herein, execution is not to issue for that sum.

The plaintiff is to have full costs.

On May 25th the appellant moved in the Common Pleas Division for an order *nisi* to set aside such judgment, and for a new trial, on the grounds:

1. That the findings of the jury, that the defendant had warranted the threshing machine to do good work, and the engine not to throw sparks, are against evidence. That there was no evidence whatever of any warranty of the threshing machine. And if the defendant's letter of December 27th, 1881, afforded any evidence of a warranty of the engine, it is not of such a warranty as the jury have found.

2. And that there was evidence that the defects complained of were due to the inexperience and bad management of the plaintiff.

3. And for excessive damages, the plaintiff himself having estimated his damages at \$300.

4. And for the misdirection of the learned Judge, in telling the jury that a warranty might have been given in this case without being in writing.

Or to enter judgment for the defendant, on the ground that the contract having been reduced to writing, and evidenced by the signature of the plaintiff, the plaintiff should not have been allowed to give oral evidence of a warranty not expressed therein; and that there was no



evidence that the agent had authority to give any warranty, or that it was communicated to the defendant, or acquiesced in by him.

The Court after consideration refused a rule. The defendant appealed.

The appeal came on to be argued on the 4th of September, 1884.\*

*MacLennan*, Q. C., and *C. R. W. Biggar*, for the appellant. The contract was in writing, and the writing was the contract and the only contract. It contained all the essentials of a contract, and it is only necessary to look at the special terms and stipulations contained in it to see that the parties intended it to be the agreement between them. Even according to the plaintiff's own evidence, the writing was the contract, and this is corroborated by the purchaser, Findlay, who says that the writing was the agreement. There is absolutely no evidence of any agreement apart from the writing. It is immaterial that the writing was not signed by defendant. It is not disputed that it was accepted by him. He accepted the notes on the 1st of July, and afterwards delivered the goods, and there is no suggestion of withdrawal or repudiation by the plaintiff before acceptance: *Agnew* on the Statute of Frauds, 275, and cases there cited; *Hoadley v. McLaine*, 10 Bing. 482.

The contract being in writing, parol evidence was inadmissible to add to or vary it: *Taylor* on Evidence, 6th ed., pp. 983-1008, especially secs. 1036-1037; *Leake* on Contracts, 1st ed., 16; *Woolam v. Hearn*, 7 Ves. 218; *Shore v. Wilson*, 9 Cl. & F. 540. This case does not fall within any of the recognized exceptions from the general rule. There is no fraud, mistake, illegality, or want of failure of consideration alleged or proved. This is not the case of a loose memorandum, or mere receipt, or a bill of parcels, not intended to contain the terms of the con-

\**Present*.—HAGARTY, C. J. O., BURTON J. A., CAMERON, C. J. C. P., and ROSE. J.



tract, such as have been held not to exclude parol evidence, and of which the cases cited in the judgment of Mr. Justice Patterson are examples, viz.: *Gordon v. Waterous*, 36 U. C. R. 321; *Allen v. Pink*, 1 M. & W. 140. See also *Lockett v. Nicklin*, 2 Ex. 93. Nor is this the case of a distinct and separate collateral agreement, such as *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erschine v. Adeane*, L. R. 8 Ch. 756; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Mann v. Nunn*, 30 L. T. N. S. 526. In such cases the evidence must be very clear and satisfactory, not mere loose talk.—See judgment of Sir George Mellish, L. R. 8 Ch. 766.

The plaintiff himself does not venture to say that the defendant or his agent said he would warrant the goods, or that he so understood him, or that he entered into the agreement on the faith of a warranty, or that, besides the writing, there was a separate agreement of warranty. Mere representations of quality at the time of the sale are entirely insufficient to vary the rule, and to allow them to be made part of the contract in this case is to overturn the rule altogether. *Simplex commendatio non nocet*. *Harnor v. Groves*, 15 C. B. 667; *Anker v. Franklin*, 43 L. T. N. S. 318. See *Leake on Contracts*, 16; *Addison on Contracts*, 7th ed., 181-182; *Hotson v. Browne*, 9 C. B. N. S. 441; *Gilpin v. Green*, 7 U. C. R. 586; *Henderson v. Cottor* 15 U. C. R. 345; *Benjamin on Sales*, 3rd Am. ed., 621. Even if the parol evidence were properly admitted, there was no evidence of a warranty to go to the jury, nor any evidence of a breach of the supposed warranty, regard being had to the letter of the 8th November, 1881. Any imperfection in the working of the machine was clearly due to bad management and want of ordinary skill, and the verdict was contrary to the evidence.

*W. Lount, Q. C.*, contra. The contract was not in writing; the writing was merely a memorandum or order shewing the description of the machines, with price and terms, and did not pretend to represent the whole contract. It was not signed by the defendant, and did not speak for or bind

him. Parol evidence was clearly admissible to shew all the terms of the contract. *Benjamin on Sales*, 3rd Am. ed., sec. 622; *Gordon v. Waterous*, 36 U. C. R., 332, and cases cited in the judgment of Mr. Justice Patterson. There was ample evidence of a warranty and of breach thereof, and the finding of the jury should be conclusive.

It is submitted that if it should be held there was not evidence of an express warranty, still the defendant, a manufacturer contracting to supply the machines which he manufactured to be applied to a particular purpose, and about which the plaintiff necessarily trusted the defendant's judgment or skill as a manufacturer, must be held to an implied warranty that the machines were reasonably fit for the purposes to which they were to be applied. *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; *Benjamin on Sales*, sec. 657.

The evidence and the finding of the jury shewed that the machines were not reasonably fit for the purposes to which they were to be applied, and the verdict should therefore stand. There was no evidence that any imperfection in the working of the machines was due to bad management and want of ordinary skill. The finding of the jury is to the contrary, and the verdict was not against evidence.

October 20, 1884. HAGARTY, C. J. O.—The statement of claim sets out the purchase by plaintiff from defendant of a steam threshing machine guaranteed to do good work, and not throw fire or sparks. That it did not do good work, and did throw sparks and fire, &c., and in consequence people would not employ plaintiff to thresh, whereby he sustained loss, &c. That he offered to return it to the defendant, and demanded back the notes given for the purchase and freight paid, which defendant refused. Plaintiff claimed damages (\$300), and a return of his notes and the freight, and other relief, &c.

The statement of defence sets out the written contract of plaintiff, denies that the engine did not do good work, and says it could be used without throwing fire if kept in proper

order, and that if it did do so, it was from plaintiff's neglect, &c. The defendant sets out that default was made in payment of first note, and, under the agreement, claims to have the engine, &c., delivered up to him to be sold, and to have judgment against plaintiff for payment of his claim and interest. It is remarkable that the defence contains no denial of the alleged guaranty.

The account given by plaintiff of the alleged contract was to this effect in substance. One Purvis was defendant's agent in Barrie, to sell agricultural machines. He had sent a circular to plaintiff, telling him of the good qualities of the machine, its safety from fire, and its power of threshing and separating, together with plan of engine, and sent also an order for it, for plaintiff to sign. The circular stated that it was impossible for sparks to quit it, and there was no machine like it, or equal to the separator for doing its work. It is not clear if there had been any previous conversation between them. The plaintiff and one Findlay, who was to work with him, went down, apparently in three or four days, to see Purvis and had a conversation, in which Purvis told him much to the same effect as in the circular: that there was no engine equal to this for safety from fire, and that the separator, for quick, clean threshing, was unequalled, and as to fire, no other machine was safe but it. The question is then put, Did you do anything in consequence?" Answer. "I gave him an order;" and after the conversation plaintiff and Findlay gave the order set out at p. 229.

The machine was furnished in the following July, and plaintiff and Findlay gave their notes as agreed.

A large amount of work was done in that autumn, threshing for various people.

Plaintiff gave evidence as to the engine throwing sparks at different places, and that people complained and would not have it to thresh. He also complained much of the separator throwing out grain, more than it ought. That he complained to Purvis at the end of August or early in September, who (as he says) hushed him up, and denied

anything was wrong. That it was no wonder plaintiff had trouble if he talked that way; not to let people hear him talk that way, &c., &c.

December 15th, plaintiff placed the matter in his solicitor's hands, who wrote to defendant a letter (ante, p. 230,) only complaining of the engine throwing fire, and that defendant had guaranteed against this, &c.

Defendant replied 27th December, (ante, p. 230,) not denying any guaranty, but insisting that the engine was safe from fire if kept in order.

The defendant at the trial objected to any evidence being given as to warranty, on the ground, as I understand, that nothing beyond the written contract could be given in evidence. At the close of plaintiff's case, defendant objected that no warranty was proved, nor was any special damage shewn.

Evidence was then gone into for the defence. And defendant objected there was no case to go to the jury, and leave was reserved to move.

The case was left to the jury by the learned Judge in the charge set out in appeal book. No objection seems to have been taken to it by either party, and it seems to me to be substantially unobjectionable. He left to the jury whether this was a warranty, what it was, how it was broken and the amount of damages.

The jury found that there was a warranty that the machine would do good work and the engine would not throw sparks, and that it was broken by the machine not doing good work and the engine throwing sparks, and assessed the damages at \$500. The learned Judge had ruled that plaintiff could not return the machine or get back his notes.

No remark appears to have been made when the verdict was rendered as to the amount of damages being larger than the amount stated in the claim.

Judgment was reserved, and on a subsequent day, after hearing the parties, the learned Judge gave judgment, as set out in the appeal book. The first note fell due before



the trial, \$377.65, and interest. The Judge delivered judgment for the difference between the note and the verdict, \$122.35, and ordered delivery up of the first note, but defendant might credit this amount on the second note. Plaintiff to have full costs.

May 25th, the defendant moved in the Common Pleas Divisional Court for a new trial.

The Court took time to consider, and on May 30th, refused an order *nisi*, and defendant appeals.

The substance of the motion was, that the findings were against evidence. No evidence of warranty. That the defects were due to plaintiff's inexperience, neglect, &c. Excessive damages, plaintiff having estimated his damages at \$300.

Misdirection in telling the jury a warranty might have been given without being in writing, or for judgment for defendant, no oral evidence being admissible, the contract being in writing; and no authority in the agent to warrant.

In appealing to this Court, the defendant, in his reasons of appeal, abandons all question as to the amount of the damages, and rests his appeal on the question of warranty and the improper reception of parol evidence, and that the writing could alone be looked to; and that even if parol evidence was admissible, it did not shew a warranty or breach, and that any imperfection, &c., was due to plaintiff's bad management, &c.

I am of opinion that the parol evidence was properly admitted.

The law is very fully and clearly stated in *Benjamin on Sales*, sec. 610, p. 599, *et seq.* "A warranty is a collateral undertaking forming part of the contract by agreement of the parties express or implied."

An antecedent representation made by vendor as an inducement to the buyer, but not forming part of the contract when concluded, is not a warranty. This is well established by *Hopkins v. Tanqueray*, 15 C. B. 130 (the horse case): "It is not, indeed, necessary that the representation, in order to constitute a warranty, should



be simultaneous with the conclusion of the bargain, but only that it should be made during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it."

It is not necessary that the word "warranty" should be used. No special form of words is necessary. "An affirmation at the time of sale is a warranty, provided it appears in evidence to have been so intended:" sec. 613 and the very full note thereto.

*Leake on Contracts*, 403, (Ed. 1878 :) "It is a question of fact in each case, upon the construction of the words used, or of the circumstances, whether there be such an intention expressed."

*Stucley v. Baily*, 1 H. & C. 405, treats this subject very fully : I also refer to *Grand Trunk v. Fitzgerald*, 5 S. C. R. 204, and the same case in Common Pleas and Court of Appeal.

The point most strenuously pressed was as to the alleged written agreement containing all the contract. If it contained all the agreement between the parties, of course the oral testimony should not be received.

The plaintiff says that on receiving these assurances from the defendant's agent he gave the written order for the engine, agreeing to the terms of payment by notes when the machine was ready for delivery, about 15th June following. Nothing was ever signed by the defendant. He might, I presume, have refused to be bound to sell or deliver the articles. He did deliver them, and obtained the plaintiff's notes, and thus completed the transaction.

I think the effect of the alleged warranty must be considered precisely as if the machine had been delivered and the notes given the same day as the plaintiff signed the order.

I think it was a question of fact to be determined at the trial whether the order signed by defendant did contain the whole of the bargain between the parties or not.

In *Bennet v. Tregent*, 24 C. P. 568, it is said: "It is a question for the jury whether the document called a bill of

sale, in which the defendant warrants his title to the vessel, really contains the contract; whether after discussion and proposal, and counter proposal, the real bargain resulted in and is contained in this document \* \* but it does not necessarily follow because there was a writing executed to pass the property which is silent as to any warranty such as is here contended for, therefore no proof of warranty can be received."

Gwynne, J., added, that it was a question for the jury whether or not the intention was that the bill of sale produced should be the expression of the contract.

The words first cited from *Bennet v. Tregent*, 24 C. P. 565, are quoted by Moss, C. J., of this Court, in *McMullen v. Williams*, 5 A. R. 521, as a statement of the rule on this subject; and as I read the case he fully adopts it as correct. No other judgment was given. I find great difficulty in distinguishing that case from the one before us so far as this principle of decision is concerned. The plaintiff bought a piano from defendant and gave a receipt note shewing the terms of sale, and undertaking to pay as therein set forth, with many provisions for defendant's protection. The vendor signed nothing. Plaintiff insisted there was an oral warranty of soundness. Evidence thereof was on objection allowed, but it was not expressly left to the jury. This Court on appeal held the evidence admissible, and Moss, C. J., says: "No tribunal dealing with facts would be disposed to find that the writing expressed, or was intended to express the whole contract."

I repeat my strong sense of the similarity in principle between this case and that before us.

I know of no rule of law or authority by which the Judge at the trial could take a case like this out of the decision of the jury, and direct as a matter of law that oral evidence of a warranty was inadmissible. Of course, when it is either conceded or is clear without controversy on the evidence that the dealings between vendor and purchaser resulted in an agreed-on instrument in writing embodying their agreement, the latter must govern, and the Judge will so direct.

I see no misdirection or miscarriage on these points to warrant interference.

In his judgment on the finding the learned Judge expressed his opinion that the order signed by the plaintiff was not intended to be anything more than an order for the goods at specified prices, and in terms binding on the plaintiff. He did not so instruct the jury however. He warned them of the absence of any reference to the separator in the correspondence between defendant and plaintiffs' solicitors. His charge was very fair and comprehensive.

Although the amount of damage is not made a reason of appeal, it was discussed before us.

Much stress was laid on the fact that in the plaintiff's claim only \$300 was stated as damages.

I think we must look at that in connection with the demand to have his notes given up, in other words to be released from paying any part of the price. The learned Judge properly held this could not be done.

The evidence given by the plaintiff was as to damage claimed by him on the season's operations, as I understand it.

Question—"Have you estimated the damage you have sustained by reason of this defective engine and separator? Ans.—"I can hardly tell, \$300 any way. I have lost that much. If the engine and separator had been good I would have gone in and got the full amount. One objected to pay me. One would not pay me after I finished. At one place in consequence of the fire they asked me for God's sake to stop the machine. Some would not pay me." That a man told him had he known the way it threw fire he would not have it at his place. "When they knew about it they would not have the engine at all."

On cross-examination he repeats much of this, and added, that he stopped threshing when he found it was so bad, and much to the same effect.

The defendant's counsel at the trial had the fullest opportunity of testing plaintiff's evidence as to damage, and examined him at length.

The direction as to damage was: "If the article falls short of the warranty it is not worth as much as it should have been. What is the difference? He has to keep the machine. He gets an inferior article. How much worse off is he than if he had got the article he should have got? The difference is the amount of damage he is entitled to. The amount the plaintiff should recover for breach of warranty, would be what it fell short of what it would have been if it was up to the warranty. The price of the machine was \$1,075. I suppose that is the value of such a machine; and how much did it fall short in value?"

I think such a direction was right.

I cannot find that the judge was asked to tell the jury to separate the damages (if any) as to the fire and the separator.

There was evidence as to both, but no attempt to divide the damage on either side.

He says (Ante page 234) after noticing there was evidence as to both kinds of damage: "The idea of having the damages assessed separately did not occur to me, and was not suggested."

I am strongly of opinion that this would be no ground for interference. Evidence might be given as to defects in a dozen parts of an engine or its various adjuncts. The jury have to assess the damage to plaintiff for having such machinery left on his hands instead of what he bargained for. It was for the defendant to ask for any greater particularity in the findings.

I have not discussed the weight of evidence in the case. There was evidence to support the verdict, assuming the jury to have believed it. It was said that the defendant's agent, Purvis, was present at the trial, but the defendant did not call him, and thus left large portions of the plaintiff's evidence as to what passed between them unanswered.

On the whole evidence adduced it was wholly a question for the jury. Had they found for the defendant, no Court would have thought of interfering. I consider there was no miscarriage on any legal point.

As to the damages, even if we ought in the absence of



any appeal on that ground to consider it, I think there was clearly sufficient evidence to warrant the jury (in their view of the merits), to give the sum awarded to plaintiff as his damage for having to keep machinery not answering the alleged warranty.

I do not think it is within the general functions of an Appellate Court to scrutinize too closely such a question as this, where no legal miscarriage has taken place.

The Court of Common Pleas was asked to interfere with the verdict apparently on a very full statement by defendant's counsel, with citations of many authorities. We have seen the notes of the motion and the cases cited, and find that the Court, after holding it over for some days, refused to interfere.

A very strong case should be made out for our interposition, and I think the defendant fails to establish it, and that the appeal should be dismissed.

BURTON, J. A.—I think there has been a miscarriage in this case in reference to the damages, which could only have occurred in consequence of the jury determining perversely to disregard the evidence and to find a verdict for the plaintiffs under any circumstances; the amount awarded being \$200 in excess of what the plaintiffs claimed and to a much larger extent in excess of any damages proved. But whether this Court should now interfere upon that ground is a matter which would require, I think, very serious consideration.

The point which I felt of the most importance on the argument is that first presented in the reasons of appeal, viz.: that the contract was in writing and was the only contract between the parties, and was designed to be the repository and evidence of the final intentions of the parties.

Perhaps one of the most difficult branches of the law of evidence is, as Mr. Taylor remarks, that which regulates the admissibility of extrinsic parol testimony to affect written instruments.



The general rule is of course clear, that such testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument; and it is well to bear in mind the reason of the rule, that when parties have deliberately put their engagements in writing in such language as imports a legal obligation it is only reasonable to presume that they have introduced into it every material term and circumstance; and consequently all parol testimony of conversations or declarations made by either of them, whether before or after or at the time of the completion of the contract, will be rejected, because such evidence, while deserving far less credit than the writing itself, would inevitably tend in many instances to substitute a new and different contract for the one really agreed upon.

There are five well established exceptions to this general rule, which are thus stated in Mr. Justice Stephen's admirable Digest of the Law of Evidence, although for the convenience of discussing this case I have not placed them in the order in which they are to be found in his work.

1. Fraud or illegality, want of capacity, &c.

2. The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract.

3. The existence of any distinct subsequent oral agreement to rescind or modify any such contract, provided that such agreement is not invalid under the Statute of Frauds or otherwise.

4. Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description, unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.

5. The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms—if from the circumstances of the case, *the Court* infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.

In connection with which may be mentioned that oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract. And also, that as the object of reducing transactions to a written form, is to take security against bad faith or bad memory, a writing for that reason is *presumed as a general rule* to embody the final and considered determination of the parties to it.

The case of *Allen v. Pink*, 4 M. & W. 140, is one in which a document was drawn up without any idea of its having any legal effect as a contract.

There is an obvious distinction between such a case and the present.

In that case it was urged that no evidence could be received of the warranty because *after the completion of the verbal contract of sale* the defendant handed to the plaintiff a memorandum to this effect :

Bought of G. Pink a horse for the sum of £7 2s. 6d.

G. PINK.

The learned Judge (Lord Abinger) in giving judgment admitted the principle that if the terms of the agreement were committed to writing, that writing alone must be looked at to ascertain the terms of the contract, but said that that principle did not apply where that memorandum was not intended to have any effect as a contract, but was more like an informal receipt. The whole contract was completed by parol, and on payment of the money this memorandum was given as a mere minute of what had occurred, but was not intended by the parties to have any legal effect as a contract.

The present case, if within the exceptions at all, can only fall within the fifth, and I propose to shew that there is nothing within the decided cases which should lead us to hold that it comes within it.

There is, I think, much confusion caused by the reference to some of the *dicta* of learned Judges on this subject, arising from the omission to bear distinctly in mind

the particular head of exception under which the case then under consideration happened to fall.

In cases falling under the second head, evidence is not received *to vary the instrument*; but if it be shewn that in consideration of one of the parties executing the instrument, the other verbally agreed to some other matter, or as it is sometimes expressed, to enter into a collateral agreement, that evidence is receivable. It is true, great caution ought to be observed in reference to such an agreement; but if there is evidence fit, in the opinion of the Court to submit to a jury, the jury are the parties to pronounce upon it.

Such are the cases of *Erskine v. Adeane*, L. R. 8 Ch. 756; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Lindley v. Lacey*, 17 C. B. N. S. 78; *Mann v. Nunn*, 30 L. J. N. S. 526.

The case of *McMullen v. Williams*, 5 A. R. 518, in this Court is referred to in support of the view that parol evidence of a warranty was admissible. I have no doubt whatever that in that case the conclusion arrived at was correct, as it was apparent, from what took place when the piano was purchased, that it was never intended that the contract should be reduced to writing; and when a document professing to shew the terms upon which the instrument was to be left in the possession of the purchaser was presented to him for signature he refused to sign it, as not embodying the terms of the actual agreement between them, and he was then told by the plaintiff it was a mere form, and upon that understanding signed it. As the learned Chief Justice remarked in that case, the character of the instrument sufficiently appeared upon the face of the instrument itself, and was further demonstrated by the evidence of the statements on which the plaintiff signed.

The learned Chief Justice, who delivered the judgment of the Court, shews that he considered the case as falling within the principle of *Allen v. Pink*, 4 M. & W. 140. I not only concurred in that judgment, but I adopt to the fullest extent the reasoning of the learned Judge by which it is sup-

ported, including his approval of the remarks of the then Chief Justice of the Common Pleas in *Bennet v. Tregent*, 24 C.P. 565, with which as applied to the facts of that case I see no reason to differ; but if it was thereby meant, as I gather from the opinions expressed by the Chief Justice on the decision and consideration of this case, to lay down the proposition, without qualification, that it is in every case a question for the jury to say whether the writing embodies the whole contract, I must respectfully dissent from that view of the law, and I shall presently point out from remarks made by him in another case that the late learned Chief Justice Moss never intended to countenance any such proposition.

I may remark that in *Bennet v. Tregent*, 24 C. P. 565, one very important matter is not referred to by any of the Judges who took part in the decision, a point which was considered by the Judges who decided *Stucley v. Baily*, 1 H. & C. 405, to be one involved in so much doubt as to have caused them to express a wish to have it submitted to a Court of Error. I refer to the question of whether where parties have executed a deed to carry out an agreement, and it is found that in the course of the negotiations for the agreement something has been said which led to it, but which has not been embodied in the deed, they can fall back upon the agreement. It would seem, it was said, that if that could be done it would affect a man's title, for instead of having a deed as evidence of it, his title would be affected by what took place before the deed was executed.

Subject to that question, which may be one of some nicety, I think it clear that in that case there was evidence of an agreement made by conversation in which certain representations were made which might not have formed part of the contract, and might be mere representations or warranties as the jury might determine. I quite agree therefore that if the difficulty about the deed is got over, it was manifestly a case in which the jury would have to say what the contract was, and I incline to think that the



execution of the deed in that case was nothing more than the delivery of the goods here. If the parties, instead of executing a bill of sale, had entered into a formal written agreement, specifying the terms upon which one agreed to sell and the other to buy the yacht, I think parol evidence of warranty would have been inadmissible; but there is this very broad distinction between the two cases—that the contract proved there consisted of conversations between the parties which were relied on as a completed bargain, so that it was impossible for the Court to say that the bill of sale was the only evidence of the bargain, and no one would dream of disputing the law laid down by Baron Bramwell, that where the contract is to be derived from the construction of a series of letters and extrinsic circumstances, inquiry must be made into all the surrounding facts, what the parties said, and what they did, the facts anterior to the contract, contemporaneous with the contract, and posterior to the contract, and therefore upon the whole evidence it must be submitted to the jury to say whether they find there was a warranty.

But where a proposal is made in writing and accepted in terms by the party to whom it was addressed, whether verbally or by acting upon it, it is a written contract, and the construction of the writing is for the Court and not for the jury : *Hotson v. Browne*, 9 C. B. N. S. 442 ; *Reuss v. Picksley*, L. R. 1 Ex. 342.

In *Lockett v. Nicklin*, 2 Ex. 93, the goods were ordered by a letter *containing a reference to a previous conversation* between the parties, and were supplied with an invoice, *nothing being said either in the invoice or letter about the terms of payment*. It was manifest, therefore, that the letter did not contain the whole terms of the contract, and parol evidence was held admissible to prove the terms. The sale, in fact, was really by parol, and the subsequent writings were merely offered in proof of a parol bargain which had become binding by the delivery and acceptance of the goods, so that the purchaser was at liberty to supplement the proof by shewing that there was an additional stipulation.



It does not at all differ in principle from *McMullen v. Williams*, 5 A. R. 518, in this Court.

The moment it is shewn to the satisfaction of the Court that the written paper is not a note or memorandum of the whole bargain but only of part of it, then it is for the jury to say what other parol terms existed, but in this case, as in other cases, there is the preliminary question for the Judge, as for instance where it is desired to let in evidence of admissions made by an agent, the Judge has to decide in the first instance whether there is evidence of his being an agent, although whenever the Judge is satisfied upon that point the whole question of the admission and of the agency itself is for the jury.

So the Judge alone must decide whether the declarant in a question of pedigree has been proved to be a deceased member of the family, and it makes no difference in this rule that the relationship of the declarant happens to be the very question in issue in the cause: *Doe Jenkins v. Davies*, 10 Q. B. 314.

So he must alone try whether a particular contract is of such a character as to let in evidence of a custom of trade to control its terms: *Lewis v. Marshall*, 7 M. & G. 729.

So on a question of whether the witness proposed to be examined was sane, the question of sanity was tried by the Judge alone. See *Cleave v. Jones*, 7 Ex. 421. But it is unnecessary to multiply instances.

In the case I have referred to, of a written proposal accepted verbally in its very terms, which I humbly submit is this case, that constitutes the contract, and it is a question for the Court alone to pronounce upon. Whether in all cases the question of whether the whole contract has been reduced to writing is one of those preliminary questions which are to be decided by the Judge, it is not necessary in this case to inquire; it is sufficient to say that it is so laid down by Mr. Justice Stephen, no mean authority, and that view has the support of Lord Abinger and Baron Parke, and of Lord Blackburn in the recent case of *Harris v. Great Western R. W. Co.*, 1 Q. B. D.

515, where he refers to his expression of opinion to that effect in *Peek v. North Staffordshire R. W. Co.*, in 10 H. L. C., at pp. 517, 528. Even in those cases there would, at all events, be the preliminary question of whether there was any evidence, that is, any evidence which ought reasonably to satisfy a jury, that the writing did not contain the whole agreement. I quite concede that when once that evidence is admitted, its credibility and weight are entirely questions for the jury, and it would be for them to say whether the representations or affirmations were merely *simplex commendatio* or a warranty.

What evidence was there here upon which the learned Judge could properly rule that the written offer by the plaintiff to the defendant, which was accepted and acted, on by him, did not contain the whole terms of the bargain.

What evidence is there of any bargain antecedent to the order or which became perfected by the order?

I can understand the case of a person offering his goods on certain terms, and the person to whom the offer was made writing back and accepting the offer. In such a case the verbal offer and the letter accepting it would constitute a contract, and all the terms of the verbal offer could be given in evidence.

All that occurred here was that Purvis puffed his wares and did his best to induce the plaintiff to purchase. If these representations were false and fraudulent, it was open to the plaintiff to shew that, and it would have been a complete answer to the defendant's claim.

But the letter here made no reference to that conversation, and did not purport to be an acceptance of a previous offer, but was simply an order to the defendant to send the goods, with which order the defendant was not bound to comply. There is no pretence upon the evidence that the representations made formed any part of the actual bargain, although we may assume that they formed an inducement to the plaintiff to make the purchase; but that is immaterial unless they are shewn to be false.

If the offer had been prefaced or had contained any

reference to any conversations, and with that additional element the defendant had acted upon it, then I agree there would have been evidence on which the Judge might have ruled that it might possibly be inferred that the writing did not contain the whole contract, and that he could not withhold the question from the jury, who might or might not decide that it ought to be inferred.

No such case is made here. This writing makes no reference to any conversation, and it is not an answer to any offer, although it is possible—I do not say it is probable—the plaintiffs were induced to make it by the representations of Purvis.

A very good illustration of the rules as to the admissibility or not of parol evidence is to be found in the two cases of *Eden v. Blake*, 13 M. & W. 614; and *Skelton v. Livius*, 2 C. & J. 411. In the former, at a sale by auction according to a printed catalogue and conditions of sale, where a lot was knocked down to a buyer, but no written contract signed, and the subject of sale such that no written contract was necessary, it was held open to the parties to shew that when the lot was put up for sale the auctioneer orally corrected the description in the catalogue, and that the contract was concluded upon the corrected description. Whilst in the other case, the contract being signed and referring to the catalogue, such evidence would not be admissible.

The statements made by Purvis were such that no sane man would regard in any other light than extravagant praise of his own goods. This is a specimen:

“He told me that there was no engine in the world equal to it—none equal to the Triumph for safety from fire and for using little water and wood, and that the Paragon Separator for quick and clean threshing was unequalled. That no machine equal to it was manufactured, it was the best of them all.” And in consequence of this he gave the order.

That order was addressed to the defendant asking him to sell them one of his Triumph Engines and Paragon Separators, giving a specific and minute description, for which the plaintiffs agreed to give their notes.

This was sent to the defendant, acted on by him, the articles sent and notes given, and admittedly no communication of any kind was made subsequently either by the defendant or his agent.

Seeing therefore there was nothing in the nature of a contract apart from this order and the defendants acting upon it, I should have concluded that there was no evidence to lead to the inference or from which the Court could infer that the parties did not intend the document to be the only evidence of the contract. If they had desired to have a warranty it was their business to insert it: *Mackenzie v. Coulson*, L. R. 8 Eq. 368; *Pickering v. Dowson*, 4 Taunt. 779; *Freeman v. Baker*, 5 B. & Ad. 797.

If they were induced to enter into it by the representations, and those representations were fraudulent, they would not be without remedy, but no such case is made or pretended.

There is one other piece of evidence which may be pertinent, but which in my opinion was not of sufficient weight to lead the Court to that inference. I refer to the letter of the solicitors.

The first of these letters did not refer to any warranty which had been given to the plaintiffs, but generally that the engine was guaranteed not to throw fire. This was written to a man whose only knowledge of the actual contract was presumably to be found in the order, and he might well therefore assume that the writers had reference to the representations made in their circulars. What was the defendant's answer?

He intimates that this plaintiff is rather unreasonable in his complaint.

1st. Because the engine was thoroughly tried before he got it.

2nd. That after a long trial he was perfectly satisfied and gave his written testimonial to that effect.

3rd. He points out that it was perfectly safe from danger by fire if kept in order, and that it had been subjected to a very severe test by the insurance inspector and found safe.



Had an express warranty been referred to one might naturally have looked for a denial, but nothing of the kind is asserted, and it would therefore be unreasonable in the extreme to draw any inference from the answer unfavorable to the defendant. But, for the reasons I have stated, this letter cannot aid the plaintiff's contention, as if the writing and acceptance formed the contract, the previous representations, even if amounting to a warranty, cannot be received in evidence, and this admission would carry the case no further.

The defendant did not deny the representations to be found in his circular, but those formed no part of the contract.

If I understand the reasoning of some of my learned Brothers correctly, it is this, that the admission of this evidence is not the admission of anything to vary the contract: that it is something beside or *dehors* the contract, and therefore the rule does not apply. With very great deference, I think that this is founded upon a misapprehension, and I cannot do better than quote from Mr. Addison's work on this point.

He says: "It has been held that a warranty made orally, on the completion," (and *a fortiori* if previous to the completion) "of a written contract of sale, cannot be introduced as part of the contract, if the contract itself is silent as to the fact of the warranty, as it is a rule of law that oral evidence shall not be given to superadd any term to a written agreement, for it would be setting aside all written contracts and rendering them of no effect. But," he proceeds: "although a warranty cannot be superadded to a written contract by oral testimony, yet, if it can be shewn that the contract was induced by an oral warranty made by one of two contracting parties, which was *false* to the knowledge of the party making it, and was made for the purpose of throwing the other contracting party off his guard, and fraudulently obtaining his consent to the bargain, this is a circumstance altogether collateral to the contract:" *Addison on Contracts*, 8th ed., p. 985. Then the evidence is



admissible, and comes within the first exception I have referred to as shewing that the contract was obtained by false pretences and bottomed in fraud—in truth, it does not vary the contract, but shews that there was fraud used in its procurement.

To shew that this is the correct view of the law I need only refer to two cases. The first decided by a great authority in commercial law, Lord Ellenborough, the case of *Powell v. Edmunds*, 12 East 6, in which it was attempted to introduce evidence of a parol warranty by the auctioneer at the time of a sale of timber under printed conditions of sale. He says: "The purchaser ought to have had it reduced into writing at the time, if the representation then made as to quantity swayed him to bid. \* \* There is no doubt that the warranty as to quantity of timber would vary the agreement contained in the written contract of sale. \* \* The only question which could be made is whether, if by a collateral representation a party be induced to enter into a written agreement different from such representation, he may not have an action on the case for the fraud."

The other, the case of *Harnor v. Groves*, 15 C. B. 667, where in an action for the breach of warranty on the sale of flour under a written contract, evidence of a verbal warranty made previously to and at the time of the sale was excluded.

In *Osborn v. Gantz*, 60 N. Y. 540, a warranty is described as an incident only of consummated or completed sales, and has no place as a contract having present vitality and force in an executory agreement of sale.

I have already referred to such cases as *Erskine v. Adeane*, L. R. 8 Ch. 756, as having no application to the question we are considering; but even in such cases the evidence would not be receivable if inconsistent with the terms of the written agreement. I will only refer to one other case which my Brother Rose has called to my notice as opposed to, but which I think strengthens my argument, since the opening remarks of Baron Martin shew that in a case like the

present the oral testimony would be excluded. I refer to *Severs v. Dowler*, 29 L. J. Ex. 122.

He says there was a proposal in writing, and if it had been accepted *simpliciter* the entire agreement would have been in writing, and could not have been added to, diminished, or altered by parol evidence.

Precisely such a case in fact as *Hotson v. Browne*, 9 C. B. N. S. 442, but there, instead of the written proposal being accepted, other terms were suggested superseding the written proposal, and these terms being accepted, the whole contract therefore was verbal. If in this case the defendant, instead of simply accepting, had made some fresh stipulation, or such new terms had been suggested by the plaintiff, and such new terms accepted, the cases would be parallel.

It is not, in the view I take of the legal question, necessary to refer to the merits, but I will merely say that the representations in the circular were not intended to convey the meaning that if the machine was used in close proximity to a barn or a haystack there was no danger of fire, but simply that there was no danger if the plain and simple directions which were given with the machine were adhered to.

Those instructions provided among other things that the engine was to be kept twenty-two feet from any barn, and the spark arrester was to be cleaned every morning, and the fan or reservoir kept constantly full of water. Yet the plaintiff admits that he never took the trouble to read the directions, failed to observe the direction to keep the engine twenty-two feet from a barn, but on the contrary admits that at one place it was right against the barn, and does not remember that the directions said the reservoir should be kept filled with water; and yet he affects surprise at the fire under such circumstances being communicated to the barn.

I cannot avoid the conviction therefore, that a very wrong verdict has been rendered, and I express my own opinion upon cases of this kind in the words of Chief Justice Gibson.

“The relation of buyer and seller is not a confidential one, and if the buyer, instead of exacting an explicit warranty, chooses to rely on the bare opinion of one who knows no more about the matter than he does himself, he has himself to blame for it. If he will buy on the seller’s responsibility let him evince it by demanding the proper security, else let him be taken to have bought on his own. He who is so simple as to contract without a specification of the terms is not a fit subject of judicial guardianship. Reposing no confidence in each other, and dealing at arm’s length, no more could be required of parties to a sale than to use no falsehood, and to require more of them would put a stop to commerce itself in driving every one out of it by the terror of endless litigation.”

There were two other cases cited in the judgment of the learned Judge in his judgment below. One was the case of *Northwood v. Rennie*, 3 A. R. 37, in which however no such question as the present arose; the other, that of *Gordon v. Waterous*, 36 U. C. R. 321. I am not prepared to adopt all the propositions of Mr. Justice Morrison, who was the mouthpiece of the Court on that occasion, but I think upon one view of the facts in that case it fully sustains my position.

In that case, according to the evidence of the defendant, which was adopted by the Court, the plaintiff went to the defendant’s works, wishing to sell him some files. The defendant’s foreman intimated to him that he would not give him an order unless the files were fully warranted to be a first-class file, equal to Jowells; that the warranty was given, and he then gave the order. That order was all that was necessary to complete the contract of sale, so that the contract, in fact, consisted of the verbal request, met by a counter request to give a warranty, the concession of that warranty, and the closing of the contract by a written order. The order was not as here, a mere proposal to purchase, which required an acceptance by the party to whom it was addressed to constitute a contract, but was an answer to the previous request, and when given completed the contract of purchase. It was impossible, under such circumstances, to exclude the other evidence. Mr. Justice

Morrison, in fact, treats it as if the contract was completed before the memorandum was made, so as to bring it within the case of *Allen v. Pink*, 4 M. & W. 146.

That the late learned Chief Justice of this Court would not have considered the evidence admissible is, I think, abundantly manifest from his remarks in the case of *Fitzgerald v. The Grand Trunk R. W. Co*, 4 A. R., at p. 611, and his reference in that case to *Harris v. The Great Western R. W. Co.*, 1 Q. B. D. 515, and to *Re Delaware* 14 Wall. 579, and *White v. VanKirk*, 25 Barb. 16.

I am of opinion therefore that whether it was a pure question for the Judge, or a mere preliminary question as to whether there was evidence for the jury, there was no such evidence here as would warrant the inference that the writing and acceptance did not contain the whole writing, and therefore that the action so far as the plaintiff's claim is concerned should have been dismissed, and a verdict entered for the defendant on his counter-claim for the first note and interest. And I am pleased to be able to come to that conclusion, as a more unfounded claim in my opinion was never presented to a jury, and the conclusion at which they arrived is most unsatisfactory.

If that were the only question we might find a difficulty in interfering, by the rules of procedure governing such cases, but it will be to me a matter of deep regret if countenance is given in this Court to the idea that parol evidence of previous conversations can be introduced to vary a written document under circumstances like the present.

As there is likely to be a difference of opinion I may be excused for briefly recapitulating the grounds of my judgment.

I do not dispute for a moment that if the contract had not been reduced to writing, or if there was evidence from which the Court could infer that the writing did not contain the whole agreement, it would be for the jury to say whether the representations did or did not amount to a warranty.

If the writing is the contract the Judge is bound to exclude all evidence to shew that the real intention of the parties to the agreement was different from that which appeared on the writing.

That a warranty, though a collateral undertaking, forms part of the contract of the sale; and that antecedent representations made by the vendor or his agent to the buyer as inducements to the bargain, but not forming part of the contract when reduced to writing, are not warranties and cannot be proved.

That the proposal in writing, signed by the plaintiff and accepted in terms by parol by the party to whom it was made, was a sufficient contract in writing to satisfy the Statute of Frauds, and constituted the only contract between the parties: *Hotson v. Browne*, 9 C. B. N. S. 442; *Reuss v. Picksley*, L. R. 1 Ex. 342.

As regards the pleadings, they perhaps furnish a very fair illustration of the laxity introduced under the present system, but I do not agree that the defendant was at all called upon to assume that the plaintiff intended to allege a warranty.

Paragraph 3 might perhaps, if it stood alone, by some stretch of imagination be held to mean that the goods were sold with a warranty; but, coupled with the prayer of the bill, I do not think that any such effect can be attributed to it. The relief sought could only be granted on the ground of fraud, or that there was a condition to that effect in the contract. A warranty in the case of specific goods would not give any such right, and I should have thought the bill demurrable. The answer could not therefore be deemed in any view to admit what is neither expressly nor impliedly alleged. The plaintiff was not entitled to recover upon the pleadings as originally framed, and I think it is to be regretted that the case was allowed to proceed without an actual formal amendment of the pleadings.



CAMERON, C. J.—I am of opinion the findings of the jury on the merits are not warranted by the evidence, and the damages awarded to the plaintiff are excessive. The appeal, therefore, should be allowed upon this ground, if it be found that the legal objections taken to the plaintiff's right to recover should not be entitled to prevail. The Court of first instance ought not to weigh evidence in too nicely adjusted scales, and if, when so weighed, only a slight preponderance of the evidence against the view taken by the jury is found, ought not to set their finding aside. But juries are not arbitrarily to dispose of men's rights just as they may think proper, because there may be some evidence to support their view, while the weight of the evidence is clearly against it, and where they do so it is the duty of the Court of first instance to interfere to prevent injustice being done; and if such Court fails to set aside the jury's erroneous finding, the Appellate Court should do so. The view expressed by Lord Justice James in *Phillips v. The London and South Western Railway Co.*, in Appeal, 5 Q. B. D. 78, satisfactorily presents the duty of the Court in such a case. In giving the judgment of the Court of Appeal on an appeal from the decision of the Queen's Bench, setting aside the finding of the jury on the ground of the smallness of damages, he said: "The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which, generally speaking, is considered to be within their exclusive province, that is to say, the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more, or would have given less. Still, the verdicts of juries as to amount of damages are subject, and must, for the sake of justice, be subject to the supervision of a Court of first instance, and if necessary of a Court of Appeal, in this way, that is to say, if, in the judgment of the Court the damages are unreason-

ably large or unreasonably small, then the Court is bound to send the matter for reconsideration by another jury."

In the present case I think a careful review and consideration of the evidence disclose that the difficulties the plaintiff found in getting the machine at all times to work satisfactorily, arose from the bad management and want of care of himself and those employed by him about the machine, rather than from any defect in the engine or separator. The engine or separator undoubtedly at times worked well, and it is difficult to understand how that which is inherently defective could work well at any time. But there is no difficulty in understanding that a good machine, which requires care and skill in its management, may work satisfactorily when it is treated with such skill and care, and yet fail to work well when the proper human aid is not given to it. And having regard to the testimonial which the plaintiff gave to the defendant as late as the 8th November, after he had used the machine for nearly three months, and wherein he sets forth that "he liked the Triumph engine and Paragon thresher well: that the engine runs like a charm: that there was no trouble in getting up steam, and as for the Paragon, it has no equal for fast and clean threshing," it is very difficult to believe that the engine and machine were so faulty as the plaintiff would now make out. Assuming the testimonial to have been false, it shews how unreliable is the man who gave it. His excuse for giving it is, that Purvis, to whom he had promised a testimonial, insisted upon his giving it, and said that it was going to do him a great deal of good, and would help him to sell machines. The man who is so readily persuaded to sign a falsehood that may work injury to others cannot complain if as against himself his statement is taken to be true. But looking at the whole evidence I take this testimonial to represent the truth a little exaggerated or highly colored, and when it was given the plaintiff believed that his own management of the engine and separator was what led to his difficulties, and perhaps he expected to be assisted by the defendant in

again putting them in working order after he had given the testimonial.

Then as to the amount of damages, they are not at all warranted by the evidence. The plaintiff in presenting his claim on the pleadings, no doubt sought a rescission of the contract, and damages amounting to \$300, based upon his loss of profits or business.

He thus sets forth his grounds for damages :

“(8) In consequence of the said defects in the said engine and machine, many persons fearing destruction of their property and buildings by fire through the employment of the said engine and machine, and also knowing of the inferior work done by said engine and machine, have refused to employ the same to do their threshing, whereby the plaintiff has suffered severe losses through failing to obtain such work.”

The following is the plaintiff's evidence in support of this :

“Q. Can you say what damage you sustained by reason of the engine and separator not working properly? A. If the engine and separator had been good, I would have gone on and got the full amount; one objected to pay me, one would not pay me after I had finished. Q. Have you estimated the damage you have sustained by reason of the defective engine and separator? A. I can hardly tell, \$300 anyway, I have lost that much.”

Again, in re-examination :

“Q. You were asked if it was honest not to pay to the defendant any of the money you received. Can you say how you stood at the end of the season's threshing in regard to your profits upon the work of the machine? A. I had not as much money as when I started to thresh. I did not make any money out of it at all, not a dollar bill.”

On this evidence under the direction of the learned Judge that the measure of the plaintiff's damages was (assuming the engine and machine to have been warranted, and not to have satisfied the warranty), the difference between its value answering the warranty, and its value in the condition in which it was by reason of its defects, the jury found the damages to be \$500—that is \$200 more than the

plaintiff claimed ; and it is to be noted that the plaintiff gave no evidence of the value of the engine and separator at all. So that the jury would have been justified in putting the plaintiff's damage at the full price of the machine, quite as well as at \$500, as far as the evidence is concerned. It is to be observed also that the learned Judge, who correctly stated the measure of the damages, which differed from the claim made by the plaintiff's statement of claim did not direct the attention of the jury to the fact that the plaintiff had not given any evidence from which the amount of damages upon this measure could be reasonably ascertained. Evidence on such a point cannot be absolutely accurate, but there ought to be some evidence from which a conclusion may be drawn, and when a plaintiff says by reason of a breach of contract he has sustained damages to \$300, a jury cannot justly award him, without evidence from which they can see he has made a calculation that does not do him justice, \$500. In tort, where sentimental damages may be given, the same certainty may not be required, but for breach of contract the damages ought to be confined as nearly as possible to injury actually sustained.

There was no proof from any expert or scientific source in what respect the engine was defective. There was only the alleged fact that it threw fire, but it was not shewn that that might not be remedied, and the cost at which it could be done was not given, if it could be remedied. Nor was it shewn that the engine might not have commanded for some other purpose than that of working a separator or threshing machine, the price the plaintiff agreed to pay for it. It therefore appears to me that the case should be submitted to another jury.

But it is right that I should express my opinion upon the legal questions presented by the defendant in his reasons of appeal. The most important of these is—Was evidence of a verbal agreement made on the part of the defendant, that the engine and separator would do good work and not throw fire—inadmissible as adding a term to



the agreement shewn by the plaintiff's order in writing of the 31st December, 1880. The order as far as material is as follows: [His Lordship read the order above set forth at p. 229.]

The following is the evidence objected to and admitted by the Court:

"Q. Did you have any conversation with Purvis when you ordered the machine? (Note: Purvis was an admitted agent of the defendant.) A. Yes, a long one. He told me there was no engine in the world equal to it; that there was no engine equal to the Triumph for safety from fire, and for using little water and wood, and that the Paragon for quick and clean threshing was unequalled. He said that no machine equal to it was manufactured; that it was the best of them all. Q. What did he say about fire? A. He said no other machine was safe but it. Q. Did you do anything in consequence? A. I gave him an order; this representation was made before I signed the order."

Upon this, two questions arise, first, was the evidence admissible; second, if it was, does it establish the contract set out in the plaintiff's statement of claim, or was it only a commendation of the class of engine and separator known as the Triumph and Paragon, manufactured by the defendant. It was admitted by the defendant that Purvis was his agent for the sale of engines and machines manufactured by him; but there was no evidence that Purvis sold or agreed to sell the engine and machine. He took the order, saw it signed and sent it to the defendant. The plaintiff's uncontradicted evidence went to shew, in addition to the extract made above, that Purvis wrote to him sending him an order to sign, and a little circular telling all about the good qualities of the machine, its safety from fire, how it would thresh a thousand bushels a day, and how it would separate the grain from the straw.

The circular was not produced, but the plaintiff, (his evidence being objected to,) said: "I cannot express in words what the circular said. It was that the engine would use very little water, and very little wood. That she would thresh ten hours in the day with ten barrels of water. It does not say the quantity of wood. It was impossible



for sparks to quit it, and there was no machine like it, and there was no machine equal to the separator for doing its work." That on receipt of the order and circular he did not immediately do anything, but went with Findlay to Purvis, and there signed the order.

This falls short of making out a sale by Purvis. The order itself is addressed to defendant at his place of business, and is a request to him to sell, and does not therefore indicate that a sale had in fact been made. Thus there being no evidence of an agreement on Purvis' part to sell the engine and separator, the defendant can only be responsible upon the ground that Purvis' representations were a warranty, upon the strength of which the plaintiff gave the order. Assuming it to be a warranty, the authorities seem to leave no reasonable room to doubt that parol evidence of it would be admissible, as a warranty, while in one sense part of a contract,—that is to say, relating to the subject of the contract,—is collateral to the contract, and may therefore be proved by parol though the contract itself is in writing. A warranty is an assertion amounting to an undertaking that the subject matter of a contract possesses some quality which may be an inducement to a purchaser to buy, and the buyer in the event of the sale taking place is entitled to have the article with the quality represented, or to compensation for its absence.

But a warranty is not a contract of sale. The plaintiff, in his statement of claim, treats the defendant's liability as arising out of a direct contract made by Purvis to sell and deliver to the plaintiff for the sum of \$1,075, a steam threshing engine and machine of the defendant's manufacture that would do good work, and would not throw fire or emit sparks of fire that would endanger buildings, or other inflammable materials that might happen to be adjacent to or in proximity to the engine or machine while in operation. The evidence does not support such a contract unless the law attaches to the defendant's contract of sale, as the manufacturer of the engine and machine, the terms that such engine and machine shall do good

work, and shall not throw fire. This does not appear to me under the authorities to be an element in or an implied part of a manufacturer's obligation. The law in this case would imply, on the seller's part, an obligation to make the engine and separator what were known as the "Triumph Engine and Paragon Separator," and that they should be reasonably sufficient for the purpose for which they were bought. An engine that throws fire, and a separator that throws or wastes grain to some extent, would not necessarily be unfit for the purpose of threshing grain. An engine placed at a hundred feet from a building might be quite safe, while the same engine at twenty feet distance would be dangerous. I think, therefore, the defendant had not, merely by reason of his being a manufacturer of engines and separators, cast upon him the obligation to deliver to the plaintiff an engine that would not throw fire, or a separator that would not waste any grain. The plaintiff's alleged cause of action does not therefore exist.

No doubt, if the evidence warranted the finding of the jury the statement of claim might be amended so as to present the case properly on the pleadings, but certainly this is not a case in which such amendment should be made, so as to support what seems to me to be an unjust verdict, and I am of opinion that the evidence of the plaintiff does not make out a warranty on the part of Purvis as defendant's agent of the particular engine and separator, but merely a representation that the Triumph engines and Paragon separators manufactured by the defendant were of the quality stated by him. The case in this respect resembles that of *Chandler v. Harding*, 17 L. T. N. S. 571, with this difference, that in that case the defendant was not the manufacturer of the article sold. It is not to be overlooked that the order of the plaintiff requires a separator like Grose's, and there is no evidence whatever that the one delivered did not answer in all respects that description.

The present case in its facts and circumstances is quite distinguishable from *Gordon v. Waterous*, 36 U. C. R. 321,

and is not within the principle on which *Allen v. Pink*, 4 M. W. 140, relied upon by the plaintiff, was decided. That principle, which is referred to with approval by the late Chief Justice Moss in *McMullen v. Williams*, 5 A. R. 518, is that where it does not appear that it was the intention of the parties that the whole contract should be reduced to writing, and the contract has been first concluded by parol and afterwards a paper drawn up merely as a memorandum of the transaction, or an informal receipt for money, not as containing the terms of the contract itself, parol evidence of the real contract is admissible. Here, if I am right as to the effect of the evidence, there was no sale or concluded bargain of which the plaintiff's written order only set forth a part.

The evidence goes no further than to shew a commendation of the defendant's engines and machines, which, if a sale had been made by the defendant's agent Purvis, might possibly have amounted to a warranty; but as that agent did not make the sale and the plaintiff addressed his offer to the defendant himself, without making known to the defendant what his agent had said, and all the defendant is shewn to have done is to supply the articles ordered, in ignorance of the agent's commendation, upon the order as he received it, it is difficult to see that the writing does not set forth the whole contract between the parties that they intended to make, except such terms as the law attaches by implication to it, and so renders evidence of any alleged other terms inadmissible. It is possible of course that Purvis may have agreed to sell the engine and separator to the plaintiff, and that the order was drawn up only for the purpose of indicating the terms of payment, and that the right of property should not be changed till the payments were made—but if so the evidence does not disclose the fact. The case rests upon the question whether Purvis represented that the particular engine and machine that defendant would deliver would possess the qualities said to belong to those called the Triumph and Paragon, or was confined to general commendation of those articles.

If Purvis were the defendant, it seems to me the latter must be held to be the case under the decision in *Chandler v. Harding*, 17 L. T. N. S. 517.

I am therefore of opinion, upon the facts appearing in evidence in this case, the parol evidence admitted was improperly admitted, but that if properly receivable it does not support the plaintiff's claim as presented on the pleadings; that the appeal should be allowed with costs; and that there should be a new trial, with costs to abide the event. I would add that the judgment of this Court in *McMullen v. Williams*, 5 A. R. 518, is an authority for directing a new trial for excessive damages.

ROSE, J.—The learned Judge at the trial was of the opinion that there was evidence to go to the jury of a warranty, breach, and damage flowing therefrom.

The jury found that there was a warranty: that it had been broken, and that the engine and machine, the purchase price of which was \$1,075, were worth less by \$500 than they would have been had the warranty not been broken.

Upon motion for judgment, the learned Judge delivered a carefully prepared written judgment in which he sustained the view he had taken of the evidence at the trial. He does not complain of the amount of the damages awarded. He does not even comment on them.

The defendant moved before the Divisional Court for an order *nisi* for a new trial. After careful consideration by the three able and experienced Judges then composing that Division, *i. e.* the present Chief Justice of the Queen's Bench, Mr. Justice Galt, and Mr. Justice Osler, now of this Court, the motion was refused, the Court feeling clearly, even on the defendant's *ex parte* shewing, that they could not interfere. Although there was no written judgment, it is clear they did not think the damages were so excessive as to bear the "marks of passion, prejudice or corruption," or that the jury "had acted upon a gross mistake of facts."



Neither the defendant nor his counsel seems to have felt that the question as to amount of damages was one which could be successfully complained of, at least in this Court, for they do not make it a ground of appeal.

On the argument, counsel for appellant expressly relieved us from considering any question as to weight of evidence, submitting to the judgment if there was *any* evidence which the learned Judge was, as a matter of law, bound to submit to the jury.

It is manifest that upon such a state of facts the defendant has a very arduous task in seeking relief in an Appellate Court. The Court must be convinced not only that the learned Judge at the trial was in error in submitting the case to the jury, but that he was so in error that after verdict the Divisional Court were, without doubt, acting erroneously in not granting a new trial. Unless he makes a case so strong as to most clearly convince the minds of the appellate Judges he must fail.

The question is not whether the Divisional Court might not well have granted a new trial, but whether it should have granted it, and was so in error as to require the interference of an Appellate Court.

As I understand it, for the reasons above given the question of damages is not before us. We have to consider alone whether there was evidence of warranty and a breach. I may, however, venture to say that if the question be now considered open, I should not feel justified in interfering. Even had the damages seemed disproportionately large to my mind, I think I should be exercising a sound discretion in doubting my own judgment after twelve jurymen had awarded them, and four able and experienced judges had not complained of their conduct.

Moreover, the question was one purely for the jury. The amount must be a matter of opinion. Even had skilled witnesses been called, the jury would not have been bound by the amount named by them. They might have adopted any one of various amounts named, or rejected them all. It follows, then, that when the facts, such as the price or



value of a machine warranted, are given in evidence, and its defects also given in evidence, the jury must draw their own conclusions or form their own opinions as to the amount to be awarded.

This will appear more clearly when it is remembered that originally juries were selected from the persons cognizant of the fact in dispute, *i. e.* from the witnesses. See "A History of the Criminal Law of England, by Sir James Fitzjames Stephen," vol. 1, p. 256. "These recognitors were, obviously, witnesses, as appears from the account given of their proceedings when they met. Upon their assembly, it is said, either all will know where the right is, or some will, and others will not, or all will not. If some, or all, are ignorant, and say so on their oaths, they are to be excluded." I take it, that as it became impracticable to draw juries from the witnesses, juries were drawn from the body of the county, and evidence laid before them to make them acquainted with the facts, and upon them they form their own opinion, which opinion is their verdict. So strongly do the American Courts hold this doctrine, that in *Cook v. Brockway*, 21 Barbour's Supreme Court Reports, p. 331, "in an action to recover damages for wheat lost and wasted by the defendant while threshing the same for the plaintiff with a machine, in consequence of the work not being properly done, a witness had testified that he had examined the chaff and straw and found wheat among them, some twenty-eight or thirty kernels in a handful of chaff, &c., it was held that he could not be asked how much wheat was wasted by the defendant in threshing 648 bushels of wheat on the ground that it was a mere matter of opinion."

Marvin, J., in delivering the opinion of the Court said: "The witnesses should have stated the facts and the jury should have exercised their judgment *and pronounced the damages*. It was their province to say how much wheat had been wasted. The principle that witnesses should not invade the province of the jury is an important one, and there is great danger in departing from it. If the

opinions of witnesses are to be substituted for the judgment of the jury upon the evidence, parties will be able by selecting their witnesses, and by talking and reasoning with them, &c., to control the amount of the verdict. Matters of opinion upon questions of damages are very uncertain: and whether the witness is honest in the opinion he gives is an issue that can rarely be decided."

The strong common sense of these observations will, I think, be apparent to all lawyers of experience.

In *Duckworth v. Johnston*, 4 H. & N. 653, Pollock, C. B., says, p. 656: "It is true that no distinct evidence was given of the value of the boy's services, and the cost of boarding and clothing him, but as to that the jury were better able to judge than we are." Martin, B., "It was argued that it ought to have been proved that the cost of boarding and clothing the boy did not exceed 4 shillings a week, but that was a question for the jury to determine."

Had it not been argued at the bar that the jury should not have fixed the amount of the damages because no witness named any sum which, in his opinion, would equal or measure the damage sustained I should have thought it free from doubt.

The argument founded on the naming of \$300 in the claim cannot be of much force, because that was the amount claimed by the plaintiff on the supposition that he was entitled to have a return of the machine and damages beyond. The learned Judge at the trial ruled, and so directed the jury, that the claim in that form failed, and the case went to the jury *on the evidence practically without pleadings* for damages on a breach of warranty. The direction of the learned Judge is not complained of as to the measure of damage in such a case. I think no relief can be had at this stage, and in my opinion the Divisional Court would not have been warranted in interfering on that ground. If the defendant chose to let the case go to the jury without cross-examination of plaintiff's witnesses as to the amount of damage sustained by breach of warranty, and without objection to the charge, and without

asking the learned Judge to call the attention of the jury to the want of any skilled evidence, I think the proper forum having expressed its opinion as to the amount of damage sustained, it does not come within the province of the Court to say they were wrong.

In *Duckworth v. Johnson*, 4 H. & N. 656, Pollock, C. B., while expressing considerable difficulty as to the want of such evidence in that case, adds: "I am quite reconciled to discharging the rule, because I do not think that this specific objection was taken at the trial." See also *Condon v. Great Southern and Western Railway Co.*, 16 Ir. C. L. R., p. 415.

If the case went down again on similar evidence what direction ought the presiding Judge to give? What sum ought he to name to the jury? What right would he have to name any sum? What could he do but to lay down the principles to guide the jury in measuring the damages, and leave it to them to name the amount? This was done in this case, and I do not see on what principle we should or could interfere. I have tried to name a sum which to my mind would be more just. I am unable to form an opinion. The sum named may, for all I know or appears, be too small. Most probably many of the jurors were familiar with such machines, and would be able to say what value they would place upon a machine which threw fire and wasted grain.

The appellant must shew the verdict to be wrong, not merely that it *may be* wrong—if he only goes that length he stops short of success.

There yet remains the question as to whether there was a warranty.

The law governing this question has been fully stated by his lordship the Chief Justice of this Court. It is a question of fact for the jury. To quote the language of Mr. Benjamin, p. 813, 4th Am. Ed., 2nd vol. "This is a question of fact for the jury, to be inferred from the nature of the sale and the circumstances of the particular case." In a foot note on p. 814 it is said, "The statement that a machine is a good machine or will do good work does not

necessarily constitute a warranty. It is a question for the jury under proper instructions."

Mr. Benjamin further says, (p. 813,) "In relation to express warranties, the rules for them do not differ from those applied to other contracts; the intention of the parties is sought and carried into effect, and in some cases even where the alleged warranty was expressed in writing it has been left to a jury to say whether the intention of the parties was that the representation or affirmation should constitute a warranty or not, for *simplex commendatio non obligat*." Again p. 811, "No special form of words is necessary to create a warranty," and citing from *Pasley v. Freeman*, 3 T. R. 51, "It was rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty if it appear in evidence to have been so intended." Again (p. 821.) "Where the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of a warranty in the former case, or to extend it in the latter by inference or implication."

The reason is given (p. 822,) citing from Abbott, C. J.: "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always; because matter talked of at the commencement of a bargain, may be excluded by the language used at its termination. But if the contract be in the end reduced to writing, nothing which is not found in the writing can be considered as part of the contract."

Endeavouring to apply the above principles, it is apparent that the question for decision is, did the paper writing in this case contain, or was it intended to contain the whole contract? If it did contain the whole contract, then it must govern. If it was intended to evidence the whole contract, it must also govern unless relief could be had on the ground of fraud or mistake, neither of which is set up here.

Is it not clear it did not contain the whole contract, as the obligation of the vendor nowhere appears in it? It is



an order, an offer of purchase. The obligation or undertaking of the vendor must be made to appear by oral testimony. If oral testimony is to be received, then are we to stop when the delivery is proved? Delivery is only evidence that the vendor accepted the order in its terms. It would be open for him to shew that the machine and engine were delivered, not pursuant to this order, but on other and different terms. If I am so far correct, is it not equally open to the vendee to shew that the obligation of the vendor was not simply to deliver, but that and something more?

In *Lockett v. Nicklin*, 2 Ex. 93, Alderson, B., says, p. 97: "An acceptance in writing is different from an acceptance by parol; the act of receiving the goods may be consistent with an agreement which contained qualified terms."

In *Stones v. Dowler*, 29 L. J. N. S. p. 122: Where there was a proposal in writing it was held that the oral acceptance not being an acceptance *simpliciter*, the real contract was by parol, and that "the evidence must be looked at to see what the contract was between the parties."

Bramwell, B., says: "The contract was not completed until the conversation when the bargain was really struck, including the ton of scrap iron."

Martin, B.: "The rule as to varying a written contract by parol evidence does not apply here, for there was no contract in writing, there was a mere proposal."

It is stated by Mr. Benjamin, p. 808, that "it is not necessary that the representation in order to constitute a warranty should be simultaneous with the conclusion of the bargain, but only that it should be made during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it." I suppose this may be accepted as correctly stating the law. If so, then it will no doubt be conceded that the fact that the negotiation continued during many days will make no difference. Admitting this, then it only remains to consider whether the representations were made and entered into the bargain as part of it. This is, as we have seen, a



question of fact for the jury. Was there any evidence to submit to the jury ?

The following cases as to oral acceptance of a written offer and admissibility of evidence of prior and contemporaneous conversation may be referred to *Lockett v Nicklin*, 2 Ex. 93 ; *Stones v. Dowler*, 29 L. J. N. S. Ex. 122 ; and as to collateral agreements not embraced in the main contract, *Morgan v. Griffith*, 6 Ex. 70 ; *Erskine v. Adeane*, L. R. 8 Ch. 763 ; *Angell v. Duke*, L. R. 10 Q. B. 174.

When the order was sent to the plaintiffs to sign a circular was also sent. I thought at first that this evidence was objected to on the ground that it was secondary in its nature, the circular not having been produced, but upon reference to the learned Judge presiding at the trial I find that this was not so, that the objection was as to receiving any oral evidence, the defendant alleging the contract to be in writing. If the objection was offered with a different intent it was overruled.

Reference to the grounds taken on the motion for the order *nisi* will shew more clearly the nature of the objection. The only ground of misdirection is "in telling the jury that a warranty might have been given in this case without being in writing." The only complaint as to improper reception of evidence on such motion was that "the plaintiff should not have been allowed to give oral evidence of a warranty not expressed in the written contract."

The reasons of appeal follow the motion paper in these respects.

The evidence as to warranty must then be found in the circular, the conversation at the time of giving the order, and the subsequent letter. It is brief.

"He (Purvis) wrote to me where I was working, sending me an order to sign, and a little circular, *telling all about its good qualities, its safety from fire, how it would thresh a thousand bushels a day, and how it would separate from the straw* \* \* He sent a circular and plan of the engine."

Q. What was said in this circular (question objected to).

A. I cannot express it in the words. It was that the engine would use very little water, and a very little wood, that she would thresh ten hours in the day with ten barrels of water. It did not say the quantity of wood. *It was impossible for sparks to quit it, and there was no machine equal to the separator for doing its work.*"

Could such evidence be withheld from the jury on a question as to warranty or no warranty; and can it be said that they were perverse in finding that the warranty was "that the machine would do good work, and that the engine would not throw sparks?"

Then the conversation with Purvis at the time the order was given.

"Did you have a conversation with Purvis when you ordered the machine? (Question objected to.)

"A. Yes, a long one. *He told me all its good qualities.* Q. What did he tell you? (Question objected to.) A. That there was no engine in the world equal to it. That there was no engine equal to the Triumph for *safety from fire*, and for using little water and wood, and that the Paragon Separator, for quick and clean threshing, was unequalled.

Q. He said that himself? A. He said that no machine equal to it was manufactured; that it was the best of them all.

Q. *What did he say about fire?* A. He said no other machine (engine?) was safe but it.

Q. Did you do anything in consequence? A. I gave him an order.

So far there are the two explicit statements as to fire: "It was impossible for sparks to quit it." "No other engine was safe but it;" or "it is safe and no other engine is."

If a categorical denial of the statement "that no other machine equal to it (the separator) was manufactured," is required we find it on page 15, line 10 of the appeal book. "I did (know something) about another kind of separator. I had an Oshawa one before. *It did not throw grain like this one.*"

But must not such language be left to the jury to say whether it was simple puffing or representations leading to

the contract and forming part of it? Can a vendor safely use language such as I have extracted, and protect himself by saying: "You, plaintiff, have not proven that there was not in the wide world an engine or separator superior to mine, and all I stated was that mine was superior to any in the world." Cannot the jury fairly say, as here, "You intended to lead your vendee to suppose he was buying a machine that would do good work, and you thus misled him into purchasing it. You continued your representations to the very moment of his handing you the order, and in our opinion your representations entered into the bargain as part of it."

In *Davey v. London and South Western R.W. Co.*, in the Court of Appeal, 12 Q. B. Div. p. 76, Bowen, L. J., says: "It seems to me to be important to draw the line clearly between the functions of the Judge and the functions of the jury. It is not because facts are admitted that it is therefore for the Judge to say what the decision upon them should be. If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the Judge to let the jury decide between such conflicting views."

Is not this case a fair example of the rule? It seems that the language I have extracted from the evidence is capable of two possible views, which reasonable people may take, for we find that there is a difference of opinion in this Court as to whether it amounts to puffing or to a warranty, and therefore the learned Judge at the trial was bound to let the jury decide between such views.

There still remains the letter and reply, which are fully referred to in the judgment just delivered by his lordship the Chief Justice of this Court.

I am therefore of the opinion that there was evidence of a warranty which the learned Judge was bound to leave to the jury, and that they were quite warranted, and not perverse, in finding a warranty on such evidence.

I am also unable to distinguish this case in principle from

*McMullen v. Williams*, 5 A. R. 518, already referred to. I was counsel for the defendant. The evidence set out in the appeal book, but not fully appearing in the report, will shew that the warranty was the result of a conversation not unlike the one in this case. I thought it pressed hardly upon the defendant that evidence of a conversation somewhat carelessly carried on between a salesman and the intending purchaser should be received so many years after the occurrence to prove a warranty, but so this Court decided, and, may I be allowed to say that the decision appears to me to be unchallengeably right, and I think governs this case. The evidence in the case before us seems to me very much stronger.

The evidence collected by his lordship the Chief Justice of this Court affords ample proof of a breach if there is a warranty. For these reasons I concur in such judgment, and agree that the appeal should be dismissed, with costs.

The Court being equally divided the appeal was dismissed, with costs.

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## RE CHARLES—FULTON V. WHATMOUGH.

*Will, Construction of—Period of vesting.*

A testator directed the trustees under his will to hold for accumulation the proceeds and income of his personal estate upon certain trusts. He also directed with reference to his real estate (with the exception of some land in Lindsay) that the income should, in the same manner as the income from his personal estate, form one fund until the death or second marriage of his widow and his youngest child should attain twenty-one, when the lands were to be sold and the proceeds held upon the same trusts as were declared concerning the personal estate, which were for the children named, in equal shares as tenants in common.

The will contained a provision that in the event of the death of any of the children leaving issue, the share of the one so dying should be divided among the issue on their attaining twenty-one.

As to the lands in Lindsay, the will contained a power to the trustees to grant building leases for terms not exceeding twenty-one years, and he directed that upon the happening of the double event above referred to the trustees should hold and apply the rents in the same manner and proportions as theretofore limited with reference to the accumulations, and the dividends and income derived therefrom. The will further provided that in default of any of his grandchildren attaining majority the proceeds of all his estate real and personal should be applied towards founding an institution in the City of Toronto for the dumb and blind : *Held*, (reversing the judgment of PROUDFOOT, J., (1 O. R. 362,) BURTON, J. A., dissenting, that the children took absolute vested interests on the happening of the double event.

*Per* BURTON, J. A., that they took only estates for life with remainder to the grandchildren.

THIS was an appeal by several of the children of the late James Charles from an order pronounced by Mr. Justice Proudfoot on the petition presented in this matter on the 8th of March, 1882, (1 O. R. 362).

The original proceedings herein were taken under the usual order for administration of the estate of the testator dated the 14th of September, 1870. The estate was administered by the Court so far as was necessary to pay creditors' claims, costs, and trustees' commission, for which purpose a portion of the real estate was sold, but the will of the testator was not construed, and the estate remained in the hands and under the management of the trustees.

The testator's will was made in 1867, (day and month being blank,) he then having children and grandchildren, and he died on the 1st March 1870.

His wife was then fifty-two years of age, and he left



eight children, one of whom, Charlotte Emma, was married and had three children then living, the eldest of whom was about five years old.

While two of the children were yet under age, on an application by one of them, James W. Charles, for an advance out of his prospective share, the will was incidentally construed for the purposes of that application, which was refused. (See 23 Gr. 610.)

By a subsequent order new trustees were appointed, viz: the defendants Walter S. Lee, John N. Lake, and James W. Charles, the eldest son of the testator.

The testator's wife survived him, and accepted the provision made for her by the will in lieu of dower. After her death, the children of the testator being all of age, and the two sons having fulfilled the conditions mentioned in the will in regard to their education, the present petition was presented by all the children of the testator interested under the will except James W. Charles, praying for the construction of the will and all proper directions to the trustees with respect to the application of the estate.

James W. Charles with his co-trustees were respondents, as were also all the grandchildren of the testator then in being, all of whom were infants.

The clauses of the will giving rise to the present appeal appear in the judgments.

The appeal came on to be heard on the 23rd May, 1884.\*

*Mowat*, A. G., and *Robinson*, Q. C., for the children of the testator. The only question in issue is, whether the children of the testator, under the provisions of the will, take life interests only in the shares devised with remainders to the grandchildren, or take estates absolute upon the death or second marriage of the widow. The devise to the children is capable of bearing only one construction, viz., that they take absolute estates. Any implication of an intent to give a different estate sufficient to cut down

\**Present*.—HAGARTY, C. J. O., BURTON and MORRISON, JJ. A., and GALT, J.

the absolute gift to the children to a mere life estate, must be express and clear: *West v. West*, 4 Giff. 198; *Taylor v. Frobisher*, 5 Deg. & Sm. 191; *Re Mortlock's Trusts*, 3 K. & J. 456; *Barton v. Barton*, 3 K. & J. 516; *Weale v. Ollive*, 32 Beav. 421; *Pennock v. Pennock*, L. R. 13 Eq. 144; *Crozier v. Crozier*, L. R. 15 Eq. 282; *Besant v. Cox*, L. R. 6 Ch. D. 604.

*Beaty*, Q. C., for Mrs. Whatmough, one of the children of the testator, and *Davidson*, for the executors, submitted their rights and interests to the Court.

*Plumb*, for the grandchildren. It is submitted that the so-called 4th Rule in *Edwards v. Edwards*, 15 Beav. 357, as overruled and re-stated in the House of Lords in *O'Mahoney v. Burdett*, 7 App. Cas. 388, and in *Ingram v. Soutten*, *Ib.* 408, should govern. The gift is to the widow for life or *durante viduitate*, remainder to the children, *nominatim* of the first generation, and if each or any child die leaving issue remainder to that child's issue; if without issue then over. If the gift over had been in the event only of the death of the first remainder-man, then it is conceded that death, the most certain of all things, being spoken of as a contingency, the meaning assigned to the words would be death within a particular period, which here would be the lifetime of the tenant for life; but where as here to the event of death there is coupled a contingency, namely, that of leaving or not leaving issue, the words will be given their natural meaning, and death without issue means death without issue at any time, and not during the limited period only of the lifetime of the tenant for life.

A. is the tenant for life, the widow; B. is a child of the first generation; C. is a child of the second generation. The gift is to A. for life remainder to B. if B. die leaving issue C. to that issue; if no issue then over. Death without issue is referable to the whole period of B.'s lifetime, unless there are directions in the will *inconsistent* with that supposition. *O'Mahoney v. Burdett*, 7 App. Cas. 388; *Ingram v. Soutten*, *Ib.* 408.

So far from disclosing inconsistent directions the context affords further assistance to this construction, for there is an ultimate gift over to a charity in default of C. attaining twenty-one years, thereby contemplating the ultimate devolution of the estate to C. Moreover the proviso for division, to wit the word "divide," is only used when C.'s share is provided for, and it is significant that the continuing duties of the trustees are contemplated and expressly controlled within and up to the extent of the rule against perpetuities. *Cadell v. Palmer*, 1 Cl. & F. 372; S. C. 10 Bing. 140. Reference may also be made to *Rodgers v. Lothian*, 27 Gr. 559.

*Mowat*, A. G., in reply.

September 5, 1884. HAGARTY, C. J. O.—If this most unhappily worded will had stopped at the devise of the residue directing the trustees to stand seized, &c., in trust for his children in equal shares, as tenants in common, we might interpret it without difficulty in the sense contended for by the appellants.

On the arrival of the expressed period of distribution, everything real and personal, except the Lindsay property, could be sold and converted into money.

When in a subsequent clause he deals with the Lindsay property, he does not seem to contemplate any different ultimate disposition of it, but, apparently impressed with its likelihood to increase in value, he gives to his trustees large leasing powers to improving tenants to the extent of terms of twenty-one years, renewable for another such term.

All this Lindsay property is to be brought into the general disposition of the residue of his estate, and the trustees are, at the decease of his wife and the majority of the youngest child, to stand seized of the rents, issues, and profits in trust for his children in such and the same shares, and under like limitations as previously limited in favor of his said sons and daughters.

Neither in this direction as to the Lindsay property, nor up to the declaration already referred to as to the estate

being held in trust for his children as tenants in common, has any mention been made of grandchildren.

I gather from all these parts of the will a reasonably clear scheme for the absolute devolution of the whole estate on his named children in equal shares on the appointed time when his widow being dead the youngest child should attain majority. He has previously spoken of a period limited for accumulation.

We have then to consider how far the other parts of the will cut down or lessen the estate previously granted or created.

Immediately after the direction as to his children taking as tenants in common comes the sentence "Provided always and in case" of any of his daughters and sons dying under twenty-one without leaving any child or children, then "as well their share or shares hereby originally provided for my said daughter or daughters, son or sons so dying as aforesaid without leaving lawful issue [as well as] the share or shares which shall have survived to her or them by virtue of this provision, shall go, remain and be to the other of my said sons and daughters last named the same as her, his, or their original share or shares as is or are hereinbefore limited for them respectively."

This paragraph must be, I consider, read as referring to a death before the happening of the double event:—widow's death and majority of youngest child.

When this will was made in 1867, the testator had certainly two, if not three daughters over the age of twenty-one, one of them married, with children. And the clause is confined to children dying under age without issue.

Up to this time there is nothing against the contention of the appellants as to the extent of the childrens' estate.

After a provision as to the coverture of daughters hereinafter noticed, comes another curiously worded sentence rather unconnected with anything before it. "Provided always, and I further declare that in the meantime until the shares *hereby* provided" (*hereinafter* provided) "for the children of my said daughters or my sons in the



said trust moneys, stock, funds and securities, shall become vested in them respectively under the trusts *hereinbefore* declared, the trustees do and shall pay and apply the interest and dividends of the portion or portions, share or shares which shall for the time being not have become vested as aforesaid for or towards the maintenance, education, and support, or otherwise for the benefit of the child or children for the time being entitled in expectancy to such portion or portions, share or shares, respectively."

It is very hard to understand this language, or discover how it is to be considered explained unless by reference to the clause in the last page of the will, which stands somewhat isolated. "I desire that the share or shares, if any, of my said children (naming them) who may die without leaving issue, shall be divided equally among the residue of my said children."

Should we not read this in connection with the clause already cited on the same subject, and as referable to a death before the double event of widow's death and majority of youngest? The previous clause provides for survivorship in case of death under twenty-one. We can give full effect to this later clause by extending it to what I call for brevity the double event. He proceeds: "But any of my children so dying leaving issue, the share of such one so dying shall be divided equally among said issue, or shall be devised by the will of such of my children so dying leaving issue as to such child of mine as may seem meet, so soon as such issue shall have attained the full age of twenty-one years."

The argument of the respondents, most ably urged by Mr. Plumb, is that, in substance, the children of the testator only take life interests, and that the corpus of the estate passes to grandchildren issue of the surviving child or children of testator.

Then comes the provision: "In default of any such issue of my said children attaining the full age of twenty-one years, then and in such case I devise the whole of my estate, real and personal," to the endowment of a dumb and blind institution.



I feel most unwilling, from the whole context of the language of this unfortunate instrument, to believe that the testator could have intended what the respondents now urge.

The learned Judge below considered that in so deciding he was positively going against the testator's intentions. Nothing but the overwhelming force of plain words should induce the Court so to decide.

I cannot bring myself to the conclusion that a perusal of the whole will forces us to the conclusion contended for by the respondents.

I think that when the term share or portion is used, it must mean a share or portion of the corpus, and not a mere life interest.

Take the last clause of the will. If a daughter marry an American, her portion or share is thereby declared forfeited, and such "share or portion" shall be equally divided among such other of my said children as may be then living, or the legal issue of such of my children as may be then deceased, such issue receiving a share,

It is difficult to understand, if the children take only for life, and the issue take absolutely, how a share can be equally divided between the life tenant and the absolute owner. If he intended his children only to have life interests, would he not have so declared in some intelligible form? There is a plethora of words in this will, yet we find nothing directly bearing on this.

After the first provision as to survivorship, he says: "As to the share of any daughter under coverture, the trustees shall receive the interest and dividends thereof, and pay it into her hands for her separate use, free from her husband's control, and her receipt shall be a discharge, &c., for such interest, &c., which shall become (due) to her during coverture in respect to her share in said stock, trust moneys, funds, and securities."

No provision is made as to the ceasing of her coverture, or its possible recurrence. I still think that the share or portion was in the corpus, and that however loosely or inaccurately expressed the idea was that the share was the

daughter's property, but the trustees during the coverture might only pay her the interest thereof.

In the case of a daughter under coverture, but without issue, the share would ultimately go as any other property of hers tied up in a similar manner during coverture.

In the provision immediately following the tenants in common clause. I think the "share" of children dying under age without issue never could have been intended to mean the life interest of such child. I cannot conceive any draftsman, so speaking of a life interest. The same remark applies to the survivorship clause on the last page.

Again, where following this last clause it is declared that the share of a child dying shall be divided equally among the issue, or may be devised by will to the issue, it seems to me beyond the bounds of possibility that such language could be used if the child had merely a life interest.

I gather from the whole will that the estate vested in the children on the happening of the double event: that the subsequent provisions as to issue are to be read as applicable to the case of children dying, first under twenty-one, secondly, dying at any time before the event which I consider the period of distribution.

I do not consider the existence of the leasing powers or the payment of only the interest of the shares to daughters under coverture need interfere with such a construction.

I consider the provision as to endowing a dumb and blind institution as designed to meet a possible but most improbable contingency, viz., the death of all children before the double event, and the failure of any issue of any child in such case attaining the age of twenty-one years.

I think, if a man having a number of children, several of whom were under twenty-one, and as young as down to nine years old at the making of his will, that if he intended giving them only life interests, and deferring the absolute possession of his estate till the birth and majority of their issue to be born many years after, he would have used some reasonably clear words to effect such a purpose.

I refuse to impute it to him on the language he (or his conveyancer) has thought proper to use in this will.

Had there been any indication of a desire as it were to "found a family" to accumulate land or a large personalty for an eldest or favoured child, we could understand a direction for accumulation to the unborn issue of children almost in infancy at the making of the will; but in the case before us I cannot help feeling the extreme unlikelihood of a Toronto merchant who orders the ultimate conversion of all his estate into money thus tying it up for nearly two generations, as the respondents argue. The testator could do this if he pleased, but he ought to leave no doubt as to his intention.

We may quote a passage from *Abbott v. Middleton*, 7 H. L., Cas. at p 89, adopted and approved in *Bathurst v. Errington*, 2 App. Cas., at p. 709: "Where by acting on one interpretation of the words we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable."

The judgment of Lord St. Leonards in that case very clearly states his view of the law as to working out the general intent of the whole will, and as to the right of the Court to supply words to carry out such intent. The cases on this point are noticed in *Theobald* 582 (Ed. 1881); *Greenwood v. Greenwood*, 5 Ch. D. 954.

I notice in the first report of the learned Judge's judgment in 23 Gr. 610, that he speaks of an application having been previously made to the Chancellor—the late Chief Justice of this Court—in which the latter seems to have considered that the children took vested interests

on the happening of the double event. From such a view my learned brother Proudfoot dissents.

I am unable to see how the doctrine of *O'Mahoney v. Burdett*, 7 App. Cas. 388, can affect our decision. It merely determined the meaning of an isolated passage unexplained or controlled by any other part, and that the fourth rule in *Edwards v. Edwards* would be better stated thus: "The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition."

BURTON, J. A.—This very peculiar will is dated 1867, and the testator died 1st March, 1870, leaving his widow and eight children, three of whom were minors at the time of his decease. One of his daughters was then married and had children.

The widow having died, and all the children having attained the age of twenty-one years, all, with the exception of James, filed a petition praying for the construction of the will.

The petitioners contended that upon a proper construction of the will the children took absolute vested interests upon the death of the widow and the youngest child attaining twenty-one, whereas the contention on the part of the grandchildren was that the children took life estates only with remainders to them.

The will first contains a bequest of all his personal estate to his executors and trustees in trust to convert into money, and after payment of debts, funeral expenses, and all expenses incident to the trusts and the legacies mentioned in the will, as they should become payable, to invest the surplus in or upon Government or real security in Upper Canada, and from the dividends to pay to his widow during life or widowhood for her maintenance and the support and education of his children an annuity of £240, and upon her death, or second marriage, the trustee was empowered to apply the same to the maintenance, support, and educa-



tion of such of the children as should be at home, single and unmarried. Then follow provisions for educating two of his sons, James and John, in such a manner as would enable them to take and manage a farm, after which they were to be placed with one of the tenants of his farms for the purpose of being instructed in the practical management of a farm, and on their respectively attaining the age of 21 they are to be placed on one of his farms not containing more than 100 acres, being treated as tenants to the trustees, and paying a fair value as rent, and in the event of refusal to be debarred from any interest under the will.

And he directed that any income not required for the trusts should be allowed to accumulate *and at the period hereby limited for said accumulations*, the trustees to hold the same upon the same trusts as they held the funds from which such accumulations proceeded.

He then deals with the real estate, devising it to the trustees upon the trusts thereafter expressed (with the exception of some land in Lindsay), until the death or second marriage of his wife, and until his youngest child attained twenty-one, upon trust to apply the income arising from it in the same manner as the dividends and income of his personal estate, so that the same for the purpose of accumulation and application to the payment of the annuity, &c., should form one fund, and on the death or second marriage of his widow, and his youngest child attaining twenty-one years, to sell the same and to apply the moneys, first, in the payment of expenses of sale and connected with the performance of the trusts, and as to the residue upon the same trusts as declared concerning the personal estate, which I understand to be these: that the trustees are to hold the same in trust for his four daughters and two sons as tenants in common in equal shares.

Then follow several provisos:

1st. That in case any of his children shall depart this life under 21, and without leaving a child or children, the share or shares originally given *as* the share which shall have



survived to *her* or *them* by virtue of this provision shall go, remain, and be to the others of his said sons and daughters the same as her or his or their original share or shares is or are limited for them respectively.

2nd. That if any of his daughters should at any time be under coverture the trustees should receive the interest and dividends of such daughters' shares, and the same into her or their hands (the word pay I suppose omitted) for her sole and separate use.

And then comes the proviso which has caused much of the difficulty in construing the will, Mr. Plumb contending that its language shews conclusively that a life estate only was intended to be given to the children with a remainder over to the grand children, whilst it is urged on the other side that no reference having been made to the grand children in any previous part of the will, and there being no express trust in their favour, it is, at most, a qualification so as to confine the provision to a child dying leaving issue.

This is the language of the section :

" Provided always and I further declare that in the meantime until the shares hereby provided *for the children* of my said daughters or of my said sons in the said trust moneys, stocks, funds, and securities shall become vested in them respectively under the trusts *hereinbefore declared*, the trustees do and shall pay and apply the interest and dividends of the portion or portions, share or shares, which shall for the time being not have become vested as aforesaid for or towards the maintenance, education, and support or otherwise for the benefit of the child or children for the time being entitled in expectancy to such portion or portions, share or shares respectively."

He then deals with the Lindsay lands, which were partially excepted from the trusts declared as to the rest of the real estate, and then he makes a reference to the contingency so frequently referred to as a period fixed for some purpose ; and having declared what the trusts were up to that time, goes on to provide that after the youngest

child attaining twenty-one and the death of the widow, the trustees shall hold the rents in trust for the children in such and the same shares, and subject to all the same limitations and provisions as were previously limited, expressed, or declared in favour of his children as near as circumstances permit.

After the usual trustee clauses comes a provision which would have been perhaps more appropriately introduced before the first proviso, and which declares that the shares of any of his children dying *without issue*, shall be divided equally among the others; but if with issue then that it shall be divided equally among the issue or shall be devised by such child as to him may seem meet so soon as such issue shall have attained the full age of twenty-one years.

The language is not very intelligible, but as I understand it, it means that in default of appointment by the child the share will go to the issue equally on their attaining twenty-one, but reserving the right of appointment to the child among the issue on their attaining that age; and in default of any such issue of his children attaining twenty-one, then he directs the trustees to convert the whole to be applied in founding an institution for the dumb and blind.

The last provision of the will places a daughter who marries a citizen of the United States on the same footing as one deceased. If she left no issue by a former marriage, the share is absolutely forfeited and divisible among the survivors or their issue; but if she left children by a former marriage, they are not affected by the subsequent marriage.

Shortly summarized then, this would seem to be the scheme of the will. After payment of debts, &c., the income of personalty and realty was to be applied to the payment of the annuity till a period named when two events should have happened—the death or marriage of the widow and the attaining of twenty-one years by the youngest child. Until that same period the surplus income was to accumulate.

On the arrival of that period all but the Lindsay lands were to be sold, and from that period the proceeds of the realty and personalty and accumulations were to form one mixed fund. Then what is the direction as to this mixed fund? It is not in terms that it shall be *divided* or paid over, but that the trustees shall stand seized and possessed of the same in trust for all his children, if living, in equal shares *as tenants in common*, with a direction, to be found in a later part of the will, that the share or shares of any of the children dying without issue should be divided equally among the rest. So that they are declared to be tenants in common of the fund, with a subsequent direction which in effect makes them joint tenants, and provides for the benefit of survivorship in case of death. This is not very consistent with the previous paragraph, which provides that in case any of them die without issue under twenty-one the share originally given as well as the share or shares which shall have survived to him, her, or them by virtue of this provision (nothing whatever having been said about survivorship in any part of the will previously or in this paragraph) shall go to the others. It is to be noted that this is the only portion of the will which professes to deal with accrued shares, (a matter perhaps of no great importance in the present case, except as indicating the inaccuracy of the draughtsman,) inasmuch as a gift over of the whole upon the failure of grandchildren is clear evidence of the intention that the word share was to include every interest

In the event of any of the children dying leaving issue, the father or mother of such issue may appoint among them, or in default they take equally, in both events only on attaining twenty-one. Then until the shares of the grandchildren become vested the trustees shall pay the interest or dividends of the portion which for the time being may not have become vested towards the maintenance and support of such grandchildren. And lastly, in default of any grandchildren attaining twenty-one, then a devise over to the charity of the whole of his estate, real and personal.

The learned Attorney-General contended that the devise to the children being clear and absolute in the early part of the will can only be cut down by language which is equally clear and unmistakable, and that if it is to be cut down in this will it is only by implication. I do not dispute that contention generally. On the contrary it is one in which I entirely concur, but there is a rule of even more importance, viz.: that the intention of the testator must be gathered from the whole scope of the will, and when we find a gift over to the charity of the whole estate upon default of any of the grandchildren attaining their majority is it not clear that the testator must have contemplated the ultimate devolution of the estate to the grandchildren, which is entirely inconsistent with the period of distribution being at any time anterior thereto ?

What has been spoken of here as the "period of distribution" appears to me to be scarcely correct ; it is in a sense the period of distribution, but it would be more correct to describe it as a period named for an apportionment of interests under the will, and not (as I think it manifestly is not) a direction to the trustees to divide and hand over the fund.

The testator has not only not said that the fund is to be then distributed and the trust then to come to an end, or to confine it to those cases in which some of the children have died leaving issue, but has used several expressions which tend strongly to a different conclusion.

If there appeared upon the face of this will a positive direction to pay over and distribute the estate among the children at a given time, inasmuch as the estate would then pass from the hands of the executors into the hands of the children, who could of course spend it, it would be difficult to say that a subsequent event such as that of a child dying without issue should divest the property and make it necessary for the executors to take steps to recover it back, and therefore the Court would hold it to refer to a child dying without issue before that time. We have



therefore always carefully to consider the whole will, and having reference to all the various clauses contained in it, obscure and difficult as they may be, to endeavour to arrive at what must have been the intention of the testator. After much consideration, and it would be affectation almost for me to add not without much doubt, I think the proper construction of this will is that on the death or second marriage of the mother and the majority of the youngest child, or what the learned Chief Justice has described as the double event, the several children of the testator then living became entitled to a life interest only in the fund, with remainder to such of the grandchildren as should attain the age of twenty-one.

There is nothing in the will to indicate a termination of the trust at the period I have referred to, if so we should probably, seeing the caution observed by the testator as to the income, find something to denote that the daughters' *shares* should be settled to their separate use, in place of which we find a provision (which pre supposes that the trustees still continue in possession of the fund and in the execution of the trusts) directing them to pay the dividends to the married daughters upon their separate receipts, from which we may fairly infer that it was intended that the trustees should still also retain the sons' shares; and this is further confirmed by the provision for the support of the grand children, and the conversion and payment over of the whole estate to the charity in the default of the grandchildren attaining twenty-one.

We find then the testator declaring that the proceeds of the real and personal property, and the income arising from all sources shall be held so that the same for the purpose of accumulation and application in payment of the annuity and legacies may form one fund.

We find upon the happening of the double event that the trustees are to hold the rents of the Lindsay property in trust for the children in the same shares and under the same limitations as are expressed in reference to the other funds, and we find no actual transfer or assignment of the



estate any where spoken of until the youngest grandchild attains twenty-one, and no direction to sell and convert the Lindsay property until there shall be a default of grandchildren under twenty-one.

It is said that the learned Judge ascribed undue weight to the expression, "the whole of my estate, real and personal," in the gift to the charity, and that it was manifest that it must be read with some qualification as it could not have been intended that the widow should lose her annuity, but I fail to appreciate that argument as until her death or marriage the period of distribution would not have arrived, and her annuity could under no circumstances be interfered with.

What then is the intention to be gathered from the whole will ?

It is, I think, clear that the testator did not intend a final distribution of the estate until the youngest of the grandchildren attained twenty-one, and that their trust was not at an end until that distribution was made, or in default of any grandchild attaining that age until they had paid over the proceeds of the estate to the charity. I think, therefore, the doctrine of *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; applies, which, as I understand it, is that *primâ facie* the words pointing to the death of the first taker without issue indicate death at any time, and that this ordinary and literal meaning is not to be departed from except in consequence of a context which renders a different meaning necessary.

I can find nothing in the context or in the general scope of this will which leads me to think that the words pointing to the death of the testator's sons and daughters without issue living at the time of their death are to be construed as pointing to their deaths otherwise than as at whatever time they may occur, but the contrary as otherwise the intention of the testator to give his estate to his grandchildren, or in default of grandchildren to the charity, would be defeated.

In this view I am unable to say that the decree which

we are asked to reverse is wrong, and in my opinion the appeal should be dismissed, with costs.

I may notice, although it is not material I think in this case, that the learned Judge has fallen into a mistake as to the trustees not taking the legal estate in the Lindsay lands. They are vested in them although they have no power to sell except on the failure of grandchildren.

MORRISON, J. A.—I have had an opportunity of reading and considering the judgment of my brother Galt, which I concur in. I think it is clear that the testator did not intend that his children should only take a life estate. I see nothing in the will shewing that it was in the contemplation of the testator that his grandchildren should take as argued. The whole scope of this will indicates the contrary, in my opinion.

GALT, J.—After the very clear abstract of the will made by my brother Burton, it is unnecessary to refer to it at length. I shall therefore confine my remarks to the two clauses which have given rise to this litigation. The testator directs as follows: "And as to the residue of the said trust moneys, &c., I request and direct that from and after the death or second marriage of my said wife, and as soon as my youngest child living at my decease or born as aforesaid in due time thereafter, shall have attained the full age of twenty-one years, that my said trustees or trustee shall stand seized and be possessed of the same in trust for my children (naming them) in equal shares, as tenants in common." This double contingency has been happily expressed by the Chief Justice as the "double event," and will be referred to by me under that designation. Had the will stopped here there can be no doubt that the children would at the time so fixed have been entitled to a division of the estate. It was, however, possible, and indeed I may say probable, that some of the children might die before the said time had arrived, the testator therefore adds: "Provided always, and in case any of my said

daughters, and my said sons shall depart this life under the age of twenty-one years without leaving a child or children, then in such case as well the share or shares hereby originally provided for my said daughter or daughters, son or sons, so dying as aforesaid without leaving lawful issue, the share or shares which shall have survived to her or them by virtue of this provision shall go, remain, and be to the others of my said sons and daughters last named the same as her or his or their original share or shares, as is or are hereinbefore limited for them respectively."

It is to be observed that no express provision is made for the issue of any child dying under the age of twenty-one, but I should understand that in such case the issue would take the share of the child so dying. Then, towards the end of the will comes the clause which has given rise to this dispute: "And I desire that the share or shares of any of my said children who may die without leaving lawful issue shall be divided equally among the residue of my said children." There could be no question that under this provision the estate was to be divided on the happening of the double event, but the will proceeds: "But any of my said children so dying leaving issue, the share of such one so dying shall be divided equally among said issue, or shall be devised by the will of such of my children so dying leaving issue as to such child of mine as may seem meet so soon as such issue shall have attained the full age of twenty-one years." It appears to me plain that this provision has reference only to the case of any of the children dying leaving issue before the happening of the double event, and has no reference to such of the children as might then be living. This proviso does not devise the portion of the child so dying leaving issue to that issue except in the event of their parent not having made a will.

Then comes the clause for the endowment: "And in default of any such issue of my said children attaining the full age of twenty-one years, then and in such case I devise the whole of my said estate, real and personal, unto my said trustees," &c. It is manifest that none of the

parties to this suit have any interest in this provision, which is only to take effect in case of their decease.

The will of the testator may be summarized as follows: He directs in the first place that the estate shall accumulate until the second marriage or death of his widow, *and* the coming of age of his youngest child.

The will was made in 1867, the testator died in 1870, at which time the wife was fifty-two years of age and the youngest child twelve, so that when the will was executed there must necessarily have been a period of at least twelve years before any division could be made, the youngest daughter being then only nine years of age, and the period might be extended to a much longer time as his wife was but forty-nine. The testator then directs that "as soon as (the double event happens) the trustee shall stand seized and possessed of the estate in trust for his children," supposing they should then all be alive, in equal shares as tenants in common. It was, however, very probable that in the meantime some of them might die without leaving lawful issue, in which case the shares of such children shall go over to the survivors. No express limitation is made in this clause in favor of such issue. By a subsequent provision this is supplied, and the will directs that if any of his children should die leaving issue the share of such one so dying shall be divided equally among such issue when such issue shall have attained the age of twenty-one years, but the testator gives to such child the power to make a will by which the disposition might be changed, so that in reality the grand children would take in their own right under the will only in the event of the parent dying intestate before the double event.

It is certain that all the children must die, and it appears clear to me that the contingency contemplated by the testator was the death occurring before the death of the wife and the coming of age of the youngest child, and not the death at any time. In my opinion the grandchildren, under the facts set forth, take nothing under the will, and this appeal must be allowed.

*Appeal allowed, BURTON, J. A., dissenting.*



## WILLIAMS v. CROW.

*Replevin bond—Avowant succeeding in replevin suit—Damages—Costs—Practice.*

Where the avowant successfully defends a replevin suit, and subsequently institutes proceedings on the replevin bond, he is not entitled to recover as part of his damages the excess of solicitor and client costs of his defence, over and above his taxed party and party costs in that action.

[BURTON, J. A., dissenting].

The Judge, at the trial in the County Court, entered a verdict for the plaintiff, instead of directing judgment to be entered; and afterwards refused a rule *nisi* to set aside such verdict. Rule 405 of the O. J. A. in effect forbids the granting of any rule to shew cause where the application is against the judgment of a Judge who tries a case without a jury.

*Quære*, as to the application of this rule to County Courts by Rule 490, but, *Held*, per PATTERSON, J. A., that the entry of the verdict might be treated as a direction to enter judgment, and was a decision from which an appeal would lie under Rule 510.

An objection to an appeal from a Judge refusing such rule might be raised by a motion in Chambers, but it was not obligatory to raise it in that manner.

*Per* OSLER, J. A.—*Semble*, that the effect of R. S. O. ch. 50, sec. 352, is to make the Imperial Act 5 & 6 Vict. ch. 97, sec. 2, as to costs in cases of replevin on a distress for rent in arrear applicable to our practice.

THIS was an action on a replevin bond executed by the defendants Crow, Young, and Taylor. An action of replevin had been brought in the Queen's Bench by D. W. Crow and the bond now sued on was then given. The goods replevied were those mentioned in the pleadings in that action; and they were replevied from the possession of the defendant Steeper, who was a pound-keeper, and with whom they had been impounded by Williams.

In the replevin action a verdict was given at *Nisi Prius* for the then plaintiff Crow against both defendants. The verdict was reversed in *banc*, (see 46 U. C. R. 87); and judgment signed by the present plaintiffs against Crow, and on signing this judgment the costs between party and party were taxed at \$271.67. These costs were paid to Williams by Crow, before this action was begun. The sum of \$50 was also paid by Crow as being a reasonable sum for the poundage fees that Williams and Steeper were entitled to. They refused to accept these sums in full, claiming in all \$110.95 for Steeper's damages, and \$430 for Williams's damages, and in addition to this for loss of time incurred in preparing for trial, &c.



This action came on to be tried before the County Court of Kent on the 12th of December, 1882, without a jury.

At the trial the plaintiff Williams was examined as a witness and stated :

“I am one of the plaintiffs ; a bill of costs was rendered against me, being the bill as between solicitor and client ; the amount of the bill was \$466 and it was reduced to \$430, of this I paid \$407.10 ; this sum and my witness fees and Steeper’s witness fees made up the \$430 ; I paid to witnesses, besides this amount and not including my own, or witness fees of Steeper or his hired man, \$92.10 ; in addition to this I spent some three days in subpoenaing witnesses, besides \$1.25 railway fare ; I subpoenaed the witnesses myself ; I have lost other time in coming in to see counsel, and in attending on the examination of the opposite party.”

At the conclusion of the case his Honour Judge Bell said :

“The plaintiffs claim as damages herein the sum of \$200. \* \* \*  
(1) The difference between the amount paid by them in defending the action and the amount paid to them by the defendant, that is the difference between the costs as between solicitor and client, and the costs as between party and party. It is well known that in defending a suit costs are incurred which cannot in that suit be taxed against the unsuccessful party. Why, in an action on the replevin bond, should the plaintiffs not be entitled to recover these costs ? The result of the replevin suit has shewn that the plaintiff therein was wrong in bringing it, and the defendants therein (the present plaintiffs) right in defending it. The damages are not remote, but are the immediate and direct result of the wrongful action of the plaintiff. I am of opinion that these damages come literally within the meaning of the language of the replevin bond as “damages sustained by the defendants by the issuing of the writ of replevin.” In this case the difference between the bills paid by the plaintiffs was \$135.13. There is evidence that the amount of the bill as between solicitor and client was reasonable, and no evidence that it was unreasonable. I therefore hold that under this head the plaintiffs are entitled to recover as damages the sum of \$135.13.

2. The plaintiffs claim that they are entitled to recover as damages the amount to which the pound-keeper would have been entitled for receiving, keeping, and attending the cattle distrained, as fixed by the by-law of the township, had they not been replevied by the defendant Crow.

I do not think the charges as fixed by the by-law unreasonable. Looking at the whole evidence I am of opinion that the cattle were fairly well taken care of, and that no negligence is shewn that would disentitle the pound-keeper to his ordinary fees. On this head I therefore assess the plaintiffs’ damages at \$86.50. The defendant Crow has paid \$50 on account of these damages, leaving \$36.50 still unpaid. \* \* \*

4. I think it may reasonably be inferred that the attendance of the plaintiffs was necessary on the trial of the replevin suit. They attended ten days, that is, five days each, and live seven miles from the place of trial. I therefore assess their damages under this head at the sum of \$13.90.

These findings shew that the plaintiffs are entitled to recover the sum of \$185.53, and I therefore enter a verdict in their favour for that amount."

The defendants on the 2nd of January, 1883, moved for a rule *nisi* calling on the plaintiffs to shew cause why this verdict should not be set aside and a verdict entered for the defendants, or why such verdict should not be reduced to the sum of \$30, or such sum as the plaintiffs were entitled to for poundage fees, upon the grounds (1) that costs not taxable between party and party had been improperly allowed as damages; (2) that the defendants were entitled to have costs as between attorney and client taxed; (3) that there was no evidence to shew that the costs charged as attorney and client costs were properly charged, and the onus of proving this was on the plaintiffs; and (4) that the verdict was contrary to law and evidence and the weight of evidence, and the defendants had already paid a reasonable amount for poundage fees.

The learned Judge refused the rule *nisi*. The defendants appealed to this Court on grounds substantially the same as those on which the rule *nisi* had been moved for.

The appeal came on to be argued on the 11th September, 1884.\*

Moss, Q.C., for the appellants.

Wilson, (of Chatham), and E. D. Armour, for the respondents. The authorities cited appear in the judgment.

October, 15th, 1884.—HAGARTY, C. J. O.—Appeal from the County Court of Kent.

The action was on a replevin bond assigned by the sheriff to the plaintiffs, defendants in the original replevin suit.

\* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ. A.

One of them was the owner of certain cattle, the other was the public pound keeper. Defendant Crow owned the cattle; Steeper was pound keeper; Williams distrained the cattle *damage feasant* on his property.

Judgment was obtained in favour of the distress, &c.

Crow, the owner, paid to Williams's attorney the party and party taxed costs, \$271.67. Williams had paid costs between attorney and client, amounting in all to \$407.10. \$50 was also paid by Crow for Steeper's pound charges. The plaintiffs refused to accept this in full, claiming \$86.50, as pound charges.

It would seem that these payments were made before the action was brought.

The defendants pleaded performance of the condition in the bond, which is in the usual statutory form.

The whole contention was as to the amount; the defendants insisting that taxed costs were alone recoverable, the plaintiffs claiming costs between attorney and client.

The learned Judge (sitting without a jury) held that costs between attorney and client were recoverable as damages under the bond. He also held that the extra sum claimed for pound charges should be recovered.

The defendants appeal.

I do not propose to discuss the technical objection urged by the respondents as to the motion for rule *nisi* for entering judgment for defendants, not being in form under the Judicature Act, and therefore that we should assume it discharged on that ground, and the judgment previously given by the learned Judge therefore stands. I consider that objection disposed of by what took place at the hearing.

In *Marshall* on Costs, p. 235, it is laid down: "Costs for which the successful party is liable to his attorney, but which he is not entitled to recover from his adversary, that is extra costs, are not recognized as a consequence of the litigation, the taxed costs being considered a full indemnity. The payment of extra costs therefore cannot constitute a ground of damage, or be recovered in any other proceeding." For this he cites *Cotterell v. Jones*, 11 C. B. 713; *Doe v. Filliter*, 13 M. & W. 47.

In the latter case it was held that when the costs of an ejectment had been taxed, the plaintiff could not, in an action for *mesne* profits, recover costs as between attorney and client. Pollock, C. B., says: "The taxed costs are a fair indemnity; and if they are not so, the rules that govern taxation ought to be altered \* \* it would be most inconvenient if the jury were allowed to give or withhold costs at their discretion."

Alderson, B.: "The taxed costs are intended to be a full indemnity to plaintiff for his expenses in getting back the land. That is the principle, whether it be fully carried out in practice, is another matter. The question is, what is to be the criterion by which the costs of getting back the land are to be estimated. A plaintiff in ejectment is in the same situation as other suitors, all of whom sue for their rights and obtain costs as an indemnity, and as other plaintiffs submit to have their costs taxed, so ought a plaintiff in ejectment. If the taxed costs are not a full indemnity, they ought to be made so."

It is pointed out that in such cases as *Nowell v. Roake*, 7 B. & C. 404; *Doe v. Huddart*, 2 C. M. & R. 316, the actual costs of plaintiff could not, under the existing practice, be then taxed or awarded by a Court of Error, and therefore they were necessarily taxed by Judge and jury.

*Cotterell v. Jones*. 11 C. B. 713 was an action against two for maliciously conspiring, &c., to bring an action for their own benefit in the name of D., a pauper, alleging that plaintiff succeeded in the action, but was put to heavy costs, &c. The head note states "*Ex concessis*, extra costs form no ground of legal damage."

Jervis, C. J., says, it is conceded that if the person wrongfully put forward, &c., had been solvent, "this action could not have been maintained inasmuch as the award of costs upon the failure of that action would in contemplation of law have been a full compensation to him for the unjust vexation, and consequently he would have sustained no damage." Talfourd, J., adds: "The only measure of damage is the costs ascertained by the usual course of law, and



the mere expenditure of money in the defence of the action does not constitute such legal damage."

The same view seems to prevail in *Grace v. Morgan*, 2 Bing. N. C. 534, per Tindal, C. J. See also per Pollock, C. B., in *Swinfen v. Lord Chelmsford*, 5 H. & N. at p. 923.

The cases on covenants to indemnify stand on a distinct ground, explained in such cases as *Smith v. Compton*, 3 B. & Ad. 407; *Howard v. Lovegrove*, L. R. 6 Ex. 43.

A man covenants to indemnify against certain claims. A claimant sues and recovers; the covenantee has to pay him the taxed costs, and he has also to pay his solicitor his own costs. He is allowed to recover against the covenantor his full actual costs.

Kelly, C. B., says in the latter case: "It would be unjust and we should not give full effect to the contract of indemnity entered into with him by the defendant if we were to deprive him of these extra costs. All the costs the plaintiff incurred, both those allowed as between party and party and also those properly incurred in addition between himself and his own attorney, were necessarily incurred." Martin, B., adds that "the costs should include everything his attorney could recover against him." We have seen four reports of this case, and the facts seem to be widely different from the report in the Law Reports. It is very hard to understand.

In *Smith v. Compton*, 3 B. & Ad. 407, Lord Tenterden said, that the covenantee was not indemnified unless he received the amount of the costs paid by him to his own attorney.

"Full costs" are held, as is admitted, to mean merely ordinary costs as between party and party. In *Jamieson v. Trevelyan*, 10 Ex. 748, the decision was on statute when defendant's damages were assessed as avowants on distress for a rent charge under 21 Henry VIII. ch. 19. 17 Car. 2 ch. 7 allowed the successful avowant his "full costs." On this the Master taxed his costs as between attorney and client. The Court held as above.

The judgment of Parke, B., is very clear. He points out that under 11 Geo. II. ch. 19, sec. 22, the Landlord and



Tenant Act, double costs were given to the successful defendant in replevin.

The Imperial Act, 5 & 6 Vict. ch. 97, gives in lieu thereof "a full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action, suit, and other legal proceeding, to be taxed by the proper officer."

On this point see *Marshall*, p. 255, 383. This 5th and 6th Vict. ch. 97, sec. 2 (1842), abolishes all doubt as to the costs in all statutes, and provides as Parke, B., states. We are not aware of any similar enactment in this country.

*Mayne* on Damages, 3rd ed., p. 70, speaking of the distinction in indemnity cases like *Smith v. Compton*, says: "This distinction seems to be a just one. Where the obligation to repay costs is thrown by the law upon a party against his will, it is fair he should only repay those costs, which the law has itself allowed; but where he has expressly undertaken to save harmless, every expense whether taxed or not may be justly recoverable."

At p. 69: "Costs are in theory supposed to be a compensation for the expenses justly and properly incurred in the actions."

In *Sedgwick* on Damages, it is stated that in general the law considers the taxed costs as the only damage which a party sustains by the defence of a suit against him, and these he recovers by the judgment of the Court.

The provision in the replevin bond, "that the plaintiff do pay such damages as the defendant shall sustain by the issuing of the writ of replevin if the plaintiff fails to recover judgment in the suit," first appears in our statute 23 Vict. ch. 45, (1860).

The opinion as to this clause by Draper, C. J., in *Blecher v. Burn*, 24 U. C. R. 59, does not touch the question of costs.

I have arrived at the conclusion that this clause as to damages does not touch the costs so as to support plaintiff's contention. I think it must mean damages as to the subject matter of the suit.

If I understand the authorities rightly the costs allowed

by law between party and party are considered as the sufficient legal compensation.

Where they were not recoverable in the proceeding as pointed out in *Doe v. Filliter*, 13 M. & W. 47, or where as in *Smith v. Compton*, 3 B. & Ad. 407, they were costs incurred by the party himself, and which he could not tax against the opposite party, he could recover his actual expenditure against a party who was liable to indemnify him against the claim.

I can find no authority for holding that successful defendants in a replevin suit should be held to a larger legal compensation in the shape of costs, than other defendants.

I think there is an intelligible distinction between a case like this, in which a statute allows certain things to be done on the giving of a prescribed bond, and the case where a vendor for good consideration agrees to indemnify a purchaser against certain or general claims to the subject matter of the sale. The latter is an indemnity properly so called, the former an agreement that another person shall do certain acts. I think a surety in such a case has a right to consider his liability limited to the costs which his principal has by law to pay in an unsuccessful suit.

As to the pound charges, I cannot say that the learned Judge erred in allowing them.

It is not assigned as a reason of appeal that these charges were not common to the two obligees in the bond, the present plaintiffs, but only belonged to one of them, the pound-keeper.

No objection appears to have been taken in the Court below. I think the appeal should be allowed as to the extra costs of suit, \$135.13. As to the \$36.50, extra pound charges, the plaintiff should recover.

BURTON, J. A.—I feel sufficient doubt in this case to prevent my concurring in the judgment, and although my learned Brothers are probably correct in the conclusion at which they have arrived, I desire to place on record my reasons for not joining in the judgment in order to point

out what I humbly conceive to be a defect in the law if the words used in the statute are not sufficient to cover the costs to which this plaintiff has been subjected.

As the law stood before the 14 & 15 Vict. ch. 64, replevin was not maintainable unless in a case in which there had been first a taking out of the possession of the owner ; it applied only to those cases where A. had taken goods wrongfully from B. and B. applied to have them re-delivered to him upon giving security until it would appear whether A. had taken them rightfully ; but by that Act a complete revolution was effected, and power was given to a person asserting a right to property which was and always had been in the peaceable possession of another to take it by writ of replevin out of his possession, the very case to which Mr. Justice Coleridge refers when he says, that it is obvious if such were the law the most crying injustice might not unfrequently result.

Although the law was changed in this material respect, the bond to be given was substantially the same as before, and so remained until the passage of the amendment in 1860, which recited that it was desirable to amend the law of replevin so as to prevent the same being perverted to purposes of injustice, and then requires certain facts to be shewn to the satisfaction of the Court before the issue of a writ, and provides in sec. 5, that before the sheriff acts on any writ of replevin he shall take a bond conditioned as in the former Act, but with this addition to it : " but also that the plaintiff do pay such damages as the defendant shall sustain by the issuing of the writ of replevin if the plaintiff fails to recover judgment in the suit."

The question is, whether under these words the plaintiff can recover the costs which he has been put to in defending the action wrongfully brought against him. There has been no express decision in this Province upon the point.

In *Burn v. Blecher*, 14 C. P. 415, as reported after the first trial, Richards, C. J., seems to have been under the impression that the bond did not contain this clause, for

he says if the bond had contained this clause "there could be no doubt he could recover his reasonable damages arising from the issuing of the replevin. What those damages are is a matter of fact for the jury to determine."

In supposing that the bond did not contain the clause, the learned Judge was mistaken.

When the case again came before the Court, the question discussed was, whether, in estimating the damages, the jury in addition to the value of the thing itself at the time it was replevied, might give damages for the loss of its use in the meantime. The Court decided that those damages could not be recovered, but the reasons assigned do not strike me as very satisfactory. If a person had with a strong hand, and without legal process, taken goods from the peaceable possession of another, such damages would be clearly recoverable. When the Act says, we will allow you, if you assert a right to goods in the peaceable possession of another, to sue out a writ of replevin, and take the goods, but if you do so you must give security to pay such damages as result from your taking such goods if your claim turns out to be unfounded, does it not mean that you shall pay all those damages which naturally flow from your wrongful act?

There is no case in which the precise question we are now considering has come up, and I admit it difficult in principle to draw a distinction between extra costs claimed as damages, as in *Howard v. Lovegrove*, L. R. 6 Ex. 43, which was an action on a contract, and in actions of tort; but I think the principle of the distinction in the earlier cases between one class of costs and another is a very artificial one, and if we can find any authority for breaking in upon it in a case such as I have referred to, which in my opinion is strictly speaking an action on an indemnity bond, we ought in the interest of justice to do it.

It appears to me that in *Blecher v. Burn*, 14 C. P. 415, sufficient weight was not given to the fact that in allowing so serious an inroad to be made in the law of property as was effected by the 14 & 15 Vict. ch. 64, the Legislature was in



effect authorizing what might turn out to be a trespass, for which a party had no adequate compensation in the mere return of his property of which he had been for a long time wrongfully deprived, and I should have thought that a statute securing compensation to him for that wrongful act, ought to have received a very liberal interpretation.

A man in the peaceable possession of property has it taken out of that possession by a writ upon a claim which turns out eventually to be wholly without foundation, but in order to prevent its loss to him forever he is compelled to enter an appearance to the suit, and to defend the action. He succeeds, but the plaintiff in the replevin action proves to be worthless and he sues the sureties on the bond, to recover all the damages he has sustained. I am unable to distinguish such a case from *Howard v. Lovegrove*, L. R. 6 Ex. 43, and I can see no good reason why he should not recover from them every thing which his attorney could recover against him.

In such a case as I have put the sureties must be presumed to know that in taking the property out of the possession of the owner a trespass would have been committed if not done under the authority of the writ, and that if the principal failed to make good his claim they were to pay any damages the owner of the property sustained by reason of the issuing of the writ. Having the authority of *Howard v. Lovegrove*, L. R. 6 Ex. 43, for the distinction, I am prepared to adopt a rule which has for its basis justice and common sense, and if it is not good law which the decision of the majority of this Court will establish it not to be, I think it very desirable that the Legislature should further interfere to prevent the cruel injustice to which the owner of property may be subjected by the exercise of a right of this kind against the owner of property peaceably and rightfully in his possession.

PATTERSON, J. A.—Mr. Wilson opposed the appeal upon the ground that the rule *nisi* was properly refused, because Rule 405 of the Judicature Act forbids the granting of any



rule to shew cause unless in cases where that mode of procedure is authorized by the rules, and that it is not authorized where the application is against the judgment of a Judge who tries a case without a jury.

If this objection were now to prevail, we might, as was intimated by one of my learned brothers when it was made, have to consider whether any or what costs of the appeal ought to be given to the respondent; because he might probably have raised the question by motion in Chambers, on shewing by affidavit such facts as do not appear from the papers, and on the ground that a discussion of the reasons of appeal served by the appellant would not be reached in consequence of the formal objection, or on the ground that the rule having been properly refused because its granting was forbidden by law, there could not be said to have been such a decision on a motion for a new trial, as under R. S. O. ch. 43, sec. 35, was appealable, or any decision from which an appeal lay under 45 Vict. ch. 6.

But though the question might thus have been raised in Chambers, there is nothing in our rules or practice to make it obligatory to raise it there.

The matter to be considered is the effect of the rules of the Judicature Act. The contention is, that they apply to County Courts, by force of Rule 490, which extends the pleadings, practice, and procedure for the time being of the High Court of Justice to County Courts, wherever the pleadings, practice, and procedure of the County Courts at the passing of the Judicature Act corresponded with those of the Superior Courts of law.

There may be some difficulty in applying this rule in all cases, because the fusion of the old jurisdictions has not been so complete as to render the practice of all the Divisions of the High Court uniform. In this very particular of moving to reverse a judgment the application to the Chancery Division under Rule 523, is not quite the same as one made under Rule 527, in the other Divisions. Rule 522 also provides for the Chancery Division, a practice as to setting down and giving notice of motions which does

not apply to the other Divisions. These are instances which shew how questions may arise in attempting to govern the County Courts by the rules made for the High Court with its three Divisions.

Then we have some kinds of business which must be done by a Divisional Court of two or three Judges, and some by a Court held by a single Judge.

If we hold that the County Court Judge sitting either in the sittings which under rule 486 take the place of the abolished terms, or at any other time under rule 488, represents both the Divisional Court and the Single Judge Court, we do so by adapting the spirit of the rules to the constitution of the County Courts, in place of reading them with rigid regard to the letter.

This, there is no doubt, is the proper way to give them practical usefulness in regulating the County Court procedure.

On this principle we read rule 510, which had come into force before the trial of the present action.

It provides that an application to reverse the judgment of a Judge who tries an action without a jury may be made either to a Divisional Court or to the Court of Appeal.

Under this rule we have frequent appeals from judgments given at the trial of actions in all the Divisions of the High Court, without any intermediate resort to a Divisional Court.

The rule in its terms does not include County Courts, while it is applied to those Courts by the effect of rule 490. Indeed it is only under this rule that an application to reverse such a judgment is authorized in a County Court action.

The intermediate appeal from the considered judgment of the Judge at the trial to the same Judge sitting the next week as *in banc* is a useless proceeding. There is therefore more reason for allowing an appeal to this Court in the first instance in County Court cases than in the High Court. Such an appeal is moreover expressly sanctioned by the statute 45 Vict. ch. 6 sec. 4, the decision at

the trial being "one which is in its nature final, and not merely interlocutory."

It happens that, in this case, the learned Judge did not direct judgment to be entered, which is the Act from which rule 510 allows an appeal. What he did was to follow the former practice of *entering a verdict* for the plaintiff, and the defendant thereupon adopted the old practice of moving for a rule to shew cause why that verdict should not be set aside. The plaintiff having been satisfied to have the Judge's finding in that shape, cannot well complain that it was moved against in the mode which had been appropriate. Both acts, the entry of the verdict, and the motion for rule *nisi*, are alike outside of the practice contemplated by the Judicature Act. It would be unfair to the plaintiff to hold that by reason of the finding being in an obsolete form there was no valid decision in his favour; but we cannot reasonably be asked to uphold that finding, and at the same time hold that the proceeding taken to impugn it, appropriate as it was to a finding in this shape, is a nullity.

Our proper course is to regard the substance and not the form. We can treat the entry of the verdict as being in effect a direction for the entry of judgment for the plaintiff. That was a decision from which this appeal was in good time, and from which, under Rule 510 and under the statute, an appeal lay to this Court. And understanding, as we do, that the refusal of the rule *nisi* was merely the Judge's expression of his adherence to his opinion, there is no difficulty in treating this appeal as an appeal from the judgment at the trial, although if driven to regard it as an appeal from the refusal of the rule *nisi* we might, for the reasons I have given, hold it sufficient to require us to decide the question of merits, neither party coming so carefully within the Judicature Act as to insist on its strict application to the other.

I proceed therefore to consider the legal question.

The bond given by Crow, who was plaintiff in the action of replevin, and by the other two defendants as his

sureties, was conditioned, amongst other things, for the payment to the plaintiffs of such damages as they should sustain by the issuing of the writ of replevin, if Crow failed to recover judgment in that action. One direct consequence of the issue of the writ was, that the plaintiffs had to defend the action; and as the bond provided for the event of Crow's failure to recover judgment, it is clear that a defence with its attendant costs was in contemplation when the bond was given.

Crow did fail, and the costs of the defence, taxable as between party and party, were paid by him.

The main question raised by this appeal is, the liability of Crow to pay, in addition, the extra costs paid or payable by the plaintiffs to their own solicitor.

The question is one which has often arisen, and the decisions found in the books may be said to follow uniformly one distinct principle from the beginning of the century down at all events as far as 1870.

That principle is, that when a person suffers damage for which he is entitled to indemnity from another, by reason of being put to costs, while in theory he is entitled to full indemnity, he is in contemplation of law fully indemnified by the costs awarded and taxed against his opponent in the litigation.

In cases where he could not tax costs against his opponent his actual necessary outlay has always been allowed; but when he recovered costs, that amount was held to be the measure of his damages.

The different rule in the two cases is spoken of as justified by considerations of convenience and consistency; but it is not at first sight obvious why a party who receives full indemnity when he cannot tax costs in an action against his opponent, should be worse off by reason of his having a judgment for costs in his favor.

This view is involved in the suggestion made forty years ago, by some of the Judges who gave judgment in *Doe v. Filliter*, 13 M. & W. 47, that if the taxed costs were not a fair indemnity the rules that govern taxation ought



to be altered ; but I imagine that both in England and with ourselves the extra costs of a successful litigant continue to form a substantial item in the damages he suffers from the litigation, notwithstanding the attention that has been bestowed on the rules that govern taxation.

The earliest case on the subject at which I have looked, is *Hathaway v. Barrow*, 1 Camp. 151, a decision at *nisi prius* of Sir James Mansfield, C. J., in 1807. That was an action on the case for conspiracy to prevent the plaintiff obtaining his certificate under a commission of bankruptcy. Costs of a petition to the Lord Chancellor had been allowed by the Lord Chancellor, and taxed against the opposite party. The Chief Justice held that he could not admit proof of the extra costs, as it would be incongruous to allow a person one sum as costs in one Court, and a different sum for the same costs in another Court.

This incongruity is more apparent in a case like that now before us, where the two scales of allowance are sought to be applied to the same person, the judgment against Crow being for the costs of defence, and further costs of the same defence being now sought against Crow in another Court.

Four years later, viz., in 1811, *Sinclair v. Eldred*, 4 Taunt. 7, was decided in the Common Pleas. It was an action for malicious arrest, the taxed costs of the former action having been paid. Sir James Mansfield, C. J., there said, delivering the judgment of the Court : " This is certainly a new species of action, I mean considering it as an action to recover the extra costs, for there was no proof of any inconvenience of any sort arising to the plaintiff, except in the payment of more costs than the law allowed him, and which therefore he ought not to recover."

In *Jenkins v. Biddulph*, 4 Bing. 160, (1827) where the plaintiff sought to recover against a sheriff extra costs as between attorney and client of reversing an outlawry to which the plaintiff had been subjected by reason of a false return of *non est inventus*, the taxed costs having been recovered, an attempt was made to distinguish the



case from those to which I have referred on the ground that this claim was against a third party, and therefore the allowance of indemnity for the whole expense incurred would not involve the incongruity deprecated in the former cases; but the Court was clearly of opinion that those cases were conclusive on the point.

In the same year, 1827, and in 1835 two cases are reported which illustrate the more liberal rule of which the successful litigant had the advantage when he could not tax costs against an opposite party. One is *Nowell v. Roake*, 7 B. & C. 404, where in trespass for *mesne* profits the plaintiff recovered his costs as between attorney and client of a proceeding in error in his ejectment suit, in which he had succeeded in reversing the adverse judgment of the Court of first instance. This was because at that time the Court of Error could not award costs to the plaintiff in error. In the ejectment suit the plaintiff had recovered his taxed costs of the general proceedings, and he did not recover, nor does he appear to have sought to recover in the action for *mesne* profits any extra costs incurred in respect of those other proceedings.

The other case, *Doe v. Huddart*, 2 C. M. & R. 316 was also trespass for *mesne* profits. The plaintiff had recovered judgment in ejectment by default against the casual ejector, and had consequently been unable to recover his costs in that action. He proved that his bill of costs amounted to £99, which was shewn to be not unreasonable as between himself and attorney; but professional witnesses also shewed that, as between party and party, not more than £22 would in their judgment be allowed. The plaintiff had a verdict, under the direction of the Judge, for the larger amount less one or two items which the Judge thought were unnecessary. In support of this verdict the plaintiff's counsel urged that in *Doe v. Davis*, 1 Esp. 358, Lord Kenyon took the distinction that when there is judgment by default in the ejectment the plaintiff might in the action for *mesne* profits go into evidence and recover the actual costs of the judgment;

but that when the action was defended, and the plaintiff recovered and taxed his costs, he was bound by that taxation and could not recover more, which distinction was also recognized and acted on in *Brook v. Bridges*, 7 B. Moore 471 ; and the counsel for the defendant gave up the objection to the recovery of the costs.

These decisions really cover the whole ground, down as far as 1870. The others found in the reports during the intervening thirty-five years, though valuable for the expressions of the eminent Judges by whom they were made, and as re-asserting the law settled by these earlier cases, add nothing to the rules so settled.

There is a *nisi prius* decision of Lord Ellenborough in 1816, *Sandback v. Thomas*, 1 Stark. 306, to the contrary of those I have referred to. The action was for malicious prosecution. The plaintiff had had judgment, in the action brought against him, for his taxed costs, yet he was held entitled to recover, in addition, his costs between attorney and client. *Sinclair v. Eldred*, 4 Taunt. 7, was cited to the Lord Chief Justice, but he nevertheless decided to allow the claim, saying: "If by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses ; if it were otherwise, it would come to this, that an attorney could not maintain an action against his client for the extra costs."

This decision, besides being opposed to the earlier decision of the full Court of Common Pleas in *Sinclair v. Eldred*, 4 Taunt. 7, was distinctly overruled in *Grace v. Morgan*, 2 Bing. N. C. 534, to which I have again to refer.

I shall now briefly notice the subsequent cases which have been cited to us.

*Smith v. Compton*, 3 B. & Ad. 407, which is the first in order of date, does not touch the question now in discussion. Like *Stubbs v. Martindale*, 7 C. P. 52, and some others in our own Courts, it was an action upon a covenant for title to recover what the plaintiff had paid in an action brought against him which he had unsuccessfully defended, and for the costs of his defence. It was not a case in which

he recovered or could recover any costs in the former action. He was himself liable to pay costs. The case is entirely outside of the present controversy.

*Grace v. Morgan*, 2 Bing. N. C. 534, decided in 1836, has an appearance of resembling in its facts the case before us, because the plaintiff sought, in an action for a vexatious distress, to recover the extra costs incurred in his action of replevin, the taxed costs in which had been paid to him by the defendant. The decision of the same Court in *Jenkins v. Biddulph*, 4 Bing. 160, was held to be conclusive against the plaintiff. The case is chiefly valuable for a clear summary given by Tindal, C. J., of the law as settled by the earlier cases which I have noticed, and which has been already given by his Lordship the Chief Justice.

In *Doe v. Filliter*, 13 M. & W, 47 (1844), the plaintiff failed to recover in an action for *mesne* profits extra costs of his ejectment suit, notwithstanding that the costs had been taxed at the instance of the defendant. The principle is succinctly stated by Rolfe, B.: "Here a taxation has taken place in the usual way, and by that the plaintiff is bound. Where indeed there has been no taxation, then *ex necessitate* the jury must say what is to be an indemnity."

*Cotterell v. Jones*, 11 C. B. 713, (1851), though an indirect authority on the point, is perhaps not a less strong one on that account. No question arose in it as to the right to recover extra costs. It was conceded that they could not be recovered. The action was for conspiring to cause an action to be brought which had resulted in a nonsuit; but the declaration did not allege that costs were awarded. The Court took judicial notice that the defendant in an action was entitled to costs on a judgment of nonsuit if he asked for them, and held that no legal damage was shewn.

The law, as thus definitely settled by all the decisions, adversely to the claim of the present plaintiff, does not seem to have been questioned again for nearly twenty years; but in *Howard v. Lovegrove*, L. R. 6 Ex. 43, decided

in 1870, the opinions of the three learned Judges, Pollock, C. B., Martin, B., and Pigott, B., certainly seem to go the whole length required for the support of the judgment now in appeal. I do not know that any one of the three judgments as reported in the regular report can be said to express that view more decidedly than another, but Martin, B., in allusion to the cases of *Sinclair v. Eldred*, 4 Taunt. 7 and *Grace v. Morgan*, 2 Bing. 534, said: "I must add that I think the same reasoning would apply to actions of tort, and I am therefore unable to assent to the principle of the decisions that have been cited to us."

These judgments were delivered in refusing a rule *nisi* to reduce a verdict by disallowing a sum included for extra costs between attorney and client. Reading the note of the argument of Prentice, Q. C., in moving for the rule, and the report of the judgments delivered, and noting the cases cited, which were only *Sinclair v. Eldred*, 4 Taunt. 7; *Grace v. Morgan*, 2 Bing. 534; *Sandback v. Thomas*, 1 Stark. 306; and *Cotterell v. Jones*, 11 C. B. 713, the point seems to have been understood both by counsel and Judges to be the right to recover extra costs as damages upon a covenant for indemnity, after having already recovered taxed costs against the plaintiff in the former action.

It is impossible, however, to gather that state of facts from the reporter's statement, or indeed to gain any clear idea of what the facts were. The case is also found in 33 L. T. N. S. 396, 19 W. R. 188, and 40 L. J. N. S. Ex. 13, and in those reports a more intelligible statement is given, although they differ somewhat in details, and do not give as full particulars as one would wish. It is left in doubt whether the taxed costs recovered by the plaintiff may not have been merely his costs, after "instructions for plea," upon the claim of damages *ultra* the amount paid into Court, upon which issue the plaintiff had succeeded; and whether therefore the costs between attorney and client may not have referred only to the proceedings before payment into Court, on which the plaintiff could not have taxed any costs against the plaintiff in the



former action. If this were so, the case would fall directly under the authority of *Nowell v. Roake*, 7 B. & C. 404. But no suggestion to that effect can be gleaned from any of the reports of the case.

It is to be regretted that the reports are not more satisfactory.

It seems impossible to treat the case as a decision upon a definite state of facts; and for that reason the judgment cannot be regarded as overruling the long and unbroken chain of earlier decisions, however distinctly the opinions expressed may seem to conflict with the views on which those earlier decisions were grounded.

My opinion is, that so far as the extra costs are concerned we must allow this appeal. I form that opinion upon the authority of the cases I have discussed, not without feeling the difficulty of maintaining that justice is meted with an equal measure to the man who, being unable from some technical cause to tax costs against an opponent, is reimbursed his full outlay, and to the man who recovering taxed costs which omit a substantial part of his expenses and loss, is confined to that amount.

I am unable to reconcile this anomaly by any distinction between the right to be indemnified by a *tortfeasor* for the damage occasioned by his wrong, and the right to be indemnified under a contract.

In the present case, however, setting aside technical considerations, I am not convinced that justice would be more nearly attained by allowing the plaintiff to retain the costs he claims, upon the rather high scale on which they have been computed, than by confining him to what he has already recovered.

The defendant substantially succeeds on this appeal; but the plaintiff retains his judgment for an amount within the jurisdiction of the Division Court. I think the defendant is entitled to the costs of the appeal, and that if the plaintiff is allowed Division Court costs in the Court below, without set-off on the defendant's part, he will be dealt with as liberally as under the circumstances he can fairly ask.



OSLER, J. A.—I think we cannot interfere with the judgment as regards the pound-keeper's fees upon any objection which was raised at the trial or argued before us; and the substantial question we have to determine is, whether the defendants, who have paid the plaintiff his taxed costs of the defence of the replevin suit, are also liable to pay his extra costs or costs between attorney and client in that suit?

I agree with my Lord that such costs are not recoverable.

It seems to me that on the true construction of the statute 23 Vict. ch. 45, sec. 5, R. S. O. ch. 53, sec. 11, they are not included in the expression "such damages as the defendant shall sustain by the issuing of the writ of replevin;" and this I think is reasonably clear when it is considered how costs and damages in replevin have been formerly dealt with, and recovered by a successful defendant, and what the grievance was which the statute was intended to remedy.

The plaintiff in replevin was entitled to damages at common law, and to costs as incident thereto by the statute of Gloucester; and the statutes of 7 H. 8 and 21 H. 8 confer upon a defendant in replevin who succeeds on his avowry, cognizance or justification, the right to recover damages and costs against the plaintiff "as the plaintiff should have done if he had recovered therein."

The damages, *qua* damages, and costs, *qua* costs, were two distinct things. The former were assessed in the action of replevin either at the trial or on a writ of inquiry, not for the thing avowed for or the infringement of any right in respect of it, but as a compensation for the expense and trouble the avowant had undergone: *Pratt v. Rutledge*, 1 Salk. 95. He never could recover, either in the action of replevin itself or in another action, damages for the use of, or for the depreciation in value of the thing replevied, and afterwards adjudged to be returned to him, or for the taking it out of his possession by means of the writ. Nor was there any reason why he should do so while replevin was confined to cases of a distress, and was

a *re-delivery* to the owner, of the goods distrained, upon his giving surety that he would pursue the action against the distrainer: *Mennie v. Blake*, 6 E. & B. 842, 850. If the latter avowed and succeeded in the action, his demand would be satisfied by payment of the rent or damage distrained for, together with his damages, if any had been assessed, and his costs of defence; or by payment of the value of the goods he had distrained.

The Court in the exercise of its equitable jurisdiction would always interfere to restrain an action on the bond, on proper terms: *Marshall* on Costs, 381; *Ruttan v. Short* 12 U. C. R. 485; *Hedley v. Closter*, 13 U. C. R. 333; *Mulvaney v. Hopkins*, 18 U. C. R. 174; *Culham v. Love*, 30 U. C. R. 410. No authority has been cited to shew that payment of the extra costs, or costs beyond the taxed costs of defence, was ever imposed upon the parties to the bond, or that they were required as a condition of relief to pay more costs than had been recovered in the original action. The only case in which I have seen a suggestion to the contrary is *Tummons v. Ogle*, 6 E. & B. 571, where counsel *in arguendo* observed that the bond secured to the obligee the amount of damage he had suffered by the removal of the goods, which included not only the costs between party and party, which the judgment gave, but also the costs between attorney and client. It was not necessary to decide the point, but Erle, J., said that he by no means agreed as to the extent to which the obligor was bound to indemnify.

The damages given by the statute of Henry VIII. may, I presume, still be recovered, and may include such a thing as the costs of the distress: *Jamieson v. Trevelyan*, 10 Ex. 748, 752.

Costs in replevin, as distinguished from damages, were the subject in some cases of special enactment. Where a defendant avowed for rent in arrear, and succeeded in the action, he was entitled by the 11 Geo. II. ch. 19, sec. 22, to tax double costs instead of the "full costs" which had been given by the statute of Charles (17 Car. 2, ch. 7, sec. 2,) and which included only the ordinary costs taxable

between party and party: *Jamieson v. Trevelyan*, 10 Ex. 748.

The Imperial Act 5 & 6 Vict. ch. 97, substituted for double costs in all cases where they were recoverable, "such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action as should be taxed by the proper officer," and the effect of sec. 313 of our Common Law Procedure Act, C. S. U. C. ch. 22, R. S. O. ch. 50, sec. 352, probably is to make that provision applicable to our practice, so far at least as the Judicature Act and Rules do not interfere. But in other cases of replevin, as, for instance, in the case of a distress *damage feasant*, which is this case, the successful defendant recovered merely his ordinary costs. So that except in cases specially provided for, the Legislature seem not to have considered that any penalty should be imposed upon the unsuccessful plaintiff, or that there should be any distinction between the costs recoverable in replevin and those recoverable in an ordinary action.

Our own replevin Act contains no provision as to costs in this particular, and costs and damages being as I have pointed out distinct, the former being in one case taxed on the principle of giving a full indemnity while in others they are allowed on the ordinary scale, there seems no reason for holding that the "damages" now mentioned in the replevin bond pursuant to the statute, embrace extra costs not awarded by the judgment in such an action of replevin as the one here in question; or that the Legislature meant in this indirect way to give, what had not been previously given, a full indemnity as to costs in all actions of replevin. The expression, "damages sustained by the issue of the writ," if it means anything more than those damages which have always been recoverable, seems to me naturally to point rather to such damages as the owner incurs in respect of the property itself, when an action of replevin has been brought instead of an action of trespass or trover to try the right of possession or ownership of goods, and the result has been to shew that they were taken by means

of the writ out of the peaceable possession of the true owner. That is the injustice spoken of by Coleridge, J., in *Mennie v. Blake* 6 E. & B. 842, 850, and was I think the grievance mainly intended to be struck at by the 23 Vict. ch. 45, the preamble of which recites that it is expedient to amend the law of replevin so as to prevent the same from being perverted to purposes of injustice.

In ordinary cases the law had already given the successful party damages sustained by the issue of the writ, very different in kind and degree from those sustained in the case just referred to, where, unless a new and more extended right to damages has been given by the statute, it is difficult to see what damages could be recovered at all, as up to the time of the issue of the writ the defendant had merely been in possession of his own property. The observations of Draper, C. J., on this subject in *Blecher v. Burn*, 24 U. C. R., 259, 265, may be referred to.

Then again, the action on the bond is in effect between the parties to the original cause. The bond is not a voluntary bond, but one which is required to be given by law. I cannot think that the law ever intended that an action should lie in one Court to recover as damages costs in addition to those which had been already awarded between the same parties in another.

The general rule is as stated in *Malden v. Tyson*, 11 Q. B. 292-301, that if any costs are awarded, nothing beyond the sum taxed according to the rules of the Court can be recovered as damages, or if costs are expressly withheld by the adjudication in the particular case none would be recoverable by suit in any other Court. Suppose that although successful, costs had been withheld from the now plaintiff in the action of replevin, I have not heard it argued that they could, nevertheless, be recovered in the action on the bond. If so, it seems to follow that the measure of the obligor's liability as regards this item of damage, is the taxed costs, that is to say, the costs awarded against him in the former suit: *Hodges v. Litchfield*, 1 Bing. N. C. 492; *Grace v. Morgan*, 2 Bing. N. C. 534.



Even if the bond be regarded apart from the statute as an agreement to indemnify the obligee, I do not regard the cases of *Smith v. Compton*, 3 B. & Ad. 407, and *Howard v Lovegrove*, L. R. 6 Ex. 43, to which may be added *Trus and Loan Co. v. Covert*, 39 U. C. R. 327, as authorities in the plaintiff's favour. They only decide the single point that one who is indemnified against the demand of a third person, and has been compelled to pay damages and costs to such person, may recover as damages from the indemnifying party not only the damages and costs so paid, but also, in certain circumstances at least, his own costs of unsuccessfully defending the action brought against him.

That was *Smith v. Compton*; and *Howard v. Lovegrove* decides nothing more. But that is not the point in this case, nor within the rule I have quoted from *Malden v. Tyson*, 11 Q. B. 301. In the former action there could have been no taxation of, or judgment for such costs, and therefore, there was no reason for limiting the amount recoverable to anything less than that which he was liable to pay to his own attorney. Here he has defended the action successfully, and has recovered from and been paid by the indemnifying party his taxed costs of defence. No case that I am aware of which has not been overruled decides that he can recover more..

I refer to *Sinclair v. Eldred*, 4 Taunt. 7; *Jenkins v. Bidulph*, 4 Bing, 160; *Grace v. Morgan*, 2 Bing. N. C. 534; *Cotterell v. Jones*, 11 C. B. 713, and to the judgment of Brett, M. R., in the recent case of *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674, 682.

I therefore think that the appeal, except as to the sum allowed for the pound-keeper's fees, should be allowed.

The jurisdiction of the County Court to entertain the action, having regard to the amount of the penalty of the bond, was assumed by the learned Judge, but that question is not before us, and I therefore express no opinion thereon.

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## WALMSLEY V. GRIFFITH ET AL.

*Vendor and purchaser—Misrepresentation by purchaser.*

The plaintiff negotiated with the defendants Griffith for the purchase of the lands in question, and at different times obtained from them writings giving him the option to purchase for \$20,000. Defendants Griffith set up that these negotiations were had with plaintiff as their agent with the view of effecting through him a sale to the Independent Order of Odd-fellows at the same or a higher price for the defendants Griffith. After these options had been given to the plaintiff, he, on the forenoon of the 17th February, 1882, agreed to sell to the Odd-fellows for \$25,000; and afterwards on the same day he went to the defendants Griffith and offered to purchase for \$19,500 in lieu of the \$20,000 previously named. He was asked by the Griffiths whether the sale to the Odd Fellows was off, to which he replied that it was, and in the same conversation informed the Griffiths that he could not sell the property for \$20,000, as a reason why he should get it for \$19,500, for if sold to another, he, plaintiff, would be entitled to a commission of \$500; and the Griffiths thereupon agreed to sell to plaintiff for \$19,500. Subsequently on the same day plaintiff entered into a contract in writing to sell to the Odd Fellows for \$25,000.

*Held*, that without reference to the question of agency to sell, the evidence shewed that a sale to the Odd-fellows was in contemplation of both parties and was the foundation of the transaction, and (reversing the judgment of Proudfoot, J.,) that the misrepresentation by the plaintiff in regard to the sale to the Odd-fellows, was such as disentitled him to a decree for specific performance.

BURTON, J. A., *dissentiente*.

THIS was an action instituted in the Chancery Division, by Thomas Walmsley against Kate Griffith and Carrie L. Griffith and George Wright and others, members of the Independent Order of Odd-fellows, seeking to obtain specific performance of an agreement entered into between the plaintiff and the defendants Griffith, for the purchase by him of certain lands and premises in the City of Toronto for the price or sum of \$19,500: and also seeking to enforce specific performance by the other defendants the members of the Order of Odd-fellows, of an agreement by them to purchase the same premises from Walmsley at \$25,000; \$10,000 down, the balance to be secured by mortgage payable in one year with interest.

The contract for sale by the defendants Griffith to plaintiff was contained in letters dated the 17th of February, 1882, after previous offers, made on behalf of the Griffiths, in writing, which they claimed were made to the

plaintiff as agent for them to sell to the Odd-fellows, but which agency plaintiff denied, claiming that he had been acting throughout for himself.

The first of these was one written by Messrs. Roaf and Roaf, solicitors for the defendants Griffith, addressed to Mr. Walmsley, on the 18th of January, 1882, in which they say :

“ We have in our hands a property, being Lot No. 3 on the south-east corner of Yonge and Shuter streets, Toronto. The price is \$20,000. There are three stores on Yonge street and several small holdings on Shuter street, now bringing, in all, over \$130 per month. If you wish to buy it we can have the matter arranged at once for you.”

The next in order of date was one signed by the Misses Griffith, and addressed to Mr. Walmsley, on the 21st of January, in which they state.

“ We offer to sell you Lot No. 3, at the S. E. corner of Yonge and Shuter streets, Toronto, for the sum \$20,000, you to search the title at your own expense and we not to furnish any abstract of title or produce any deeds or documents other than those now in our possession. This offer to remain open for—”

Then followed a second letter by the Misses Griffith on the 9th of February, to the plaintiff in the following terms.

“ We offer to sell and convey to you Lot No. 3, on the S. E. corner of Yonge and Shuter streets, Toronto, being about 44 feet on Yonge street by about 122 on Shuter street for \$20,000, provided you at any time with in 60 days from this date signify to us in writing your acceptance of this offer, we agreeing neither to sell nor offer for sale the property to any one else during that period. You to search title at your own expense and we not to furnish any abstract of title or produce any deeds or documents other than those now in our possession.”

The plaintiff did not accept any of these offers, but on the 17th February, under the circumstances appearing in the evidence and judgment of Hagarty, C. J. O., set out below, he procured an acceptance from the Griffiths of the following written offer :

“ I offer to purchase from you lot No. 3, on the S. E. corner of Yonge and Shuter streets, Toronto, being about 44 feet on Yonge street, by about 122 feet on Shuter street, for \$19,500 ; I to search title at my own expense, and you not to furnish any abstract of title or produce any deeds or documents other than those now in your possession. You of course making a good title free from incumbrances and giving me possession on or before the 24th inst.”

The acceptance thereof, dated the same day, was as follows :

“Dear Sir,

“We hereby accept your offer of \$19,500 for our property on the corner of Yonge and Shuter streets, Toronto, as set out in your letter of this date.

Yours truly,

CARRIE L. GRIFFITH.  
KATIE C. GRIFFITH.”

The contract of sale, made on the 17th February, between Walmsley and the Odd-fellows, was in writing, signed by the respective parties, for sale to and purchase by the Odd-fellows of the premises for \$25,000.

The statement of defence put in by the defendants Griffith set forth that plaintiff was, during the whole of the year 1881, a trustee for them, and in that capacity acquired an accurate knowledge of their property and its value; and they had requested him, while he held their lands as trustee as well as subsequently, to try to effect a sale thereof to the Independent Order of Odd-fellows at \$20,000, of which order plaintiff had for many years been a member; that he accepted such employment, and undertook to effect a sale of said lands to the Odd-fellows, and from time to time until up to the 17th of February represented that he was making every exertion to effect such sale, and stipulated for payment of a commission for his services in effecting a sale thereof.

The defendants Griffith claimed that they were entitled to the benefit of the contract of sale with the Odd-fellows, which had been effected by Walmsley while he was in fact acting as their agent, and in that view the solicitors of the defendants wrote to the solicitors acting for the Odd-fellows forbidding any further dealings by them with the plaintiff and claiming the benefit of their said contract.

The defendants Griffith therefore claimed that the paper which the plaintiff claimed to be a contract on their part to convey to him might be declared fraudulent and void as against them, and be delivered up to be cancelled; that they might be declared entitled to the benefit of the said contract.

with the Odd-fellows ; that the plaintiff might be declared to be a trustee for the said defendants (Griffith) ; and that the defendants the Odd-fellows might be ordered specifically to perform their contract of purchase, the defendants (Griffith) being willing and thereby offering to perform the same on their part.

The action came on for trial before Proudfoot, J., at Toronto on the 15th, 16th, 19th and 20th, days of December, 1882, when evidence was taken at great length, the material parts of which are stated in the judgments.

*S. H. Blake*, Q.C., *J. MacLennan* Q.C., and *J. B. Clark*, for the plaintiff.

*C. Moss*, Q.C., and *Arnoldi*, for the defendants Griffith.

*McCarthy* Q.C., and *J. A. Paterson*, for the defendants the Odd-fellows.

At the conclusion of the case.

PROUDFOOT, J.—This case has now occupied the better part of a week. It has been elaborately argued, but as there do not, in my view, occur any questions of law upon which I have serious doubt, I think it better to dispose of it at once. I wish that I had just as little doubt upon the questions of fact.

The plaintiff's connection with the suit of *Griffith v. Griffith* ended on the 3rd October, 1881, (29 Gr. 145) and there does not seem anything in the relationship that he bore to the Griffiths in that suit to constitute a fiduciary relation between him and them now. The defendants the Misses Griffith allege, indeed, that he was their trustee, and that while he was their trustee he had undertaken the further duty of disposing of this property. There is no evidence of that. The trusteeship, however, that is now relied upon in the argument of counsel on behalf of the Misses Griffith is, that he had undertaken to dispose of this property sometime in January last or December of last year. In order to make out that defence it is necessary to establish some promise or agreement on the part of the plaintiff that he would so undertake. There is no dispute that the plaintiff and the Misses Griffith entered into the contract of the 17th February—that the plaintiff made the



offer, and that it was accepted on behalf of the Griffiths. But it is said that this was made with a view of shewing the plaintiff's authority merely to dispose of the property, and under the belief that the plaintiff had offered the property to the Odd-fellows for sale, and that they had refused it.

These are questions of fact to be determined upon the evidence before me. This is one of those disagreeable cases where the duty is cast upon the Judge of determining between directly conflicting statements. The plaintiff distinctly denies that he ever entered into such an agreement, while Messrs. Roaf and Evans as distinctly swear that he did. In such a case, where there is a writing evidencing the relationship of the parties, the importance of it is invaluable. The danger of relying upon the memory of witnesses was the cause and justification of the statute of frauds itself. It was thought to be dangerous to allow the transactions of parties to rest merely upon the memory of witnesses perhaps at a long distance of time after the transaction had occurred, and that, therefore, it was advisable in the interests of justice to require that certain contracts at all events should be evidenced by writing. The same difficulty, I suppose, is experienced almost every day in Courts in determining what was the real agreement between parties where they have not reduced it to writing, so that if there are any of the dealings of these parties that are evidenced in writing that shews the character of the relationship between them, I would place far more reliance upon that than upon any verbal evidence. Now the evidence of the plaintiff, it is true, is the evidence of a man who is very materially interested in the success of his suit, while the witnesses on the other side, Messrs. Roaf and Evans, have no pecuniary interest in the affair; but it is well known that there are other motives as cogent and influential as merely mercenary ones—the maintenance of professional status, the maintenance of a reputation for skill; and the effect of these with reference to one of the witnesses, Mr. Roaf, and the claims of friendship with reference to the other witness, are sometimes just as powerful as any mercenary motive could be. Then the memory of these witnesses, Mr. Roaf and Major Evans, does not seem to be of that tenacious and accurate character to enable us to trust to it with implicit reliance. Both of them—Major Evans in particular—testifies to his entire forgetfulness of several of the trans-



actions that had taken place between these parties, and to say that we are to place implicit confidence upon a statement of his regarding transactions at a more remote period than those forgotten, is asking a Court to give a greater degree of credit to his memory than I think it is entitled to. Without meaning to impugn the rectitude of these witnesses, I cannot help feeling that they exhibited a bias in the matter—perhaps an unconscious one on their part, but it was a bias certainly in favour of the view that they expressed.

Now, how do these writings shew the relationship of the parties? Every one of the writings, all the letters and the offers and contracts and agreements that have been put in evidence, are all consistent with the plaintiff's evidence. If Mr. Roaf had desired to confer an authority merely on the plaintiff to dispose of the property, it certainly is a most extraordinary mode of doing it, to put it in the shape of a contract, an offer to sell to the plaintiff himself. There was no necessity for concealing the ownership of the property. There was no reason why the Griffiths should be kept back in the transaction, and the plaintiff is treated as a purchaser direct from the Griffiths. The letters of the 18th January, 21st January, 9th February, and the final one on the 17th February, all deal with the plaintiff as the purchaser. They make the offer of sale to him. They now state it had been made to enable him to shew that to the purchaser. But I think the witnesses must have made a mistake as to that, for it evidently was not intended that he should shew that to the purchaser, or it might have defeated the object they had in view of getting the \$22,000. Mr. Evans has sworn that the intention was to get \$22,000, and yet these are offers to the plaintiff for \$20,000. If that was merely an authority to the plaintiff to sell and dispose of the property by negotiation with other people, it would impose a bar to his getting the sum that he wanted to get.

Then the last paper, that is of the 17th February, is a distinct proposal by the plaintiff on his own behalf, and it is accepted by the owners. The Messrs. Roaf throughout these negotiations are treated as the agents of the owners of the property for the disposition of it. The plaintiff is a purchaser through their means, and on the day following the offer and acceptance Mr. Roaf informs Miss Griffith in London of the sale and of the price; he does not mention the purchaser, but he says that at that time he had no notice of any sale to any other person, and we must con-

clude, therefore, that the sale that he spoke of was the sale to the plaintiff. He tells Miss Griffith then that the property had been sold to the plaintiff, and that the plaintiff was the purchaser. Then it is difficult to understand the further dealings, on paper also, unless the plaintiff shall be considered and was to be considered as purchasing on his own behalf. If the plaintiff was merely an agent why should the deed have been made to him? If he was merely dealing as the agent of the Misses Griffith for selling that property, and he had made a bargain on their behalf with the other defendants, the members of the Odd-fellows Association, why should not the deed have been made direct to them from the Misses Griffith? There is no reason assigned for it: and I cannot see anything in the alleged reasons assigned by Messrs. Evans and Roaf about having employed him to deal for the property that required the conveyance to be made in that way.

Then there is the question as to when the sale to the Odd-fellows was known. Now, upon that I cannot avoid the conclusion that the evidence of the Misses Griffith themselves is conclusive upon the point, and they both say they knew of it before they executed the deed. Now the deed was executed, I believe, on the 11th March by both these parties, and they must have known of the sale prior to that period. Mr. Roaf was so struck with this that he said he did not believe they did know it; but whether we are to take Mr. Roaf's belief or their oath, I cannot hesitate to adopt the oath. Then Mr. Roaf himself says that he did not know of the sale at that time. He denies that, at the time of the execution of the deed, he was aware of the Odd-fellows being interested in the property. In this Mr. Roaf is contradicted by Mr. Paterson, and Mr. Paterson's statement is accompanied by the statement of his very accurate recollection of the conversation between himself and Mr. Roaf. The reasons why he went to see him all seem to shew that Mr. Paterson's evidence is more to be relied upon than the contrary statement. He was there and he was employed by the Odd-fellows. Well, it is difficult to understand how he could have gone to Mr. Roaf to make inquiry into the title, and to get answers to his requisitions and get information on the subject, unless Mr. Roaf had known that he was there acting for some person who was interested. He was not acting for Walmsley, because Walmsley was represented by Messrs. Foster & Clark, so that I quite give credence

to Mr. Paterson's statement that he did upon that day inform Mr. Roaf of the character in which he was acting.

There is another branch of the evidence which it seems to me ought to have some weight in considering the transaction, and that is that some of the Odd-fellows themselves say that they supposed that Mr. Walmsley was acting as their agent—that he was acting on their behalf. All the evidence that I have got to shew that Mr. Walmsley was acting for the Odd-fellows, as agent for the Odd-fellows, would go to shew that he could not be acting as agent for the Griffiths. There are others of the Odd-fellows, however, who say that the notion of any agency of Walmsley for them was not derived from any allegations of his, nor from any statements of his, but from their supposition that Walmsley being an Odd-fellow, and because he was an Odd-fellow, would be inclined to deal favorably for their society.

I think that, taking that view of the effect of the evidence, I am bound to come to the conclusion that Walmsley did not undertake any agency or assume any responsibility towards the Misses Griffith in disposing of the property.

I do not think that these talks or conversations that Mr. Moss referred to, the talk with Wright as to owning the property, and the talk with McCormack and the talk with Dodds, placed the plaintiff's case in any unfavourable position. Dr. Wright's evidence in chief was that he told him he was the owner of the property; that he had the deed of the property; but that was very much qualified on his cross-examination. He says on his examination in chief that he said he had the deed; the deeds were prepared three months before the sale to us, and the whole matter would have been closed but that one of the Griffiths was away. And then on cross-examination, he did not say he had the deed, but that it had been prepared three months before, and he could not say whether he spoke of having deeds or papers.

Now Mr. Walmsley's statement, if he had made the statement, that he had the papers with reference to the title, would be accurate enough because he had the contract for sale, but Dr. Wright cannot say that he went any further than that. He cannot say positively that he said he had the deeds, but only that he had the papers. I do not think that impugns Mr. Walmsley's evidence.

Then McCormack's statement was that he only thought that as he was an Odd-fellow he would act in the interest

of the Order, not from anything that took place at these meetings, and Walmsley told him that he and his partner had advanced money on the property and this was two or three weeks after the contract was signed.

That is the only statement of the kind that is to be found any place, and I do not know that it is a very material one, even supposing it to be accurate.

The talk with Mr. Dodds is rather more curious. Mr. Dodds seems to have been under the impression that he was at that time the agent for the Griffith estate, and he says that he so told him, but yet he was going to make use of the agency so as to give the Odd-fellows the inside track, whatever that may mean. I suppose it means that Walmsley was going to play double traitor—that he was going to be a traitor to the Griffith estate and a traitor to the Odd-fellows.

I do not think there is anything to justify that supposition on behalf of Mr. Dodds. It is inconsistent with nearly all the evidence that we have.

The plaintiff's statement is that he told him he had been trustee, and Dodds says that he said "I was trustee," and the two are quite consistent.

I think, therefore, that I am bound to hold that there was no agency on behalf of the plaintiff with regard to the Misses Griffith.

Then, with regard to the Odd-fellows, there is no denial that there was a contract entered into between these parties, and notwithstanding the elaborate argument I have heard from Mr. McCarthy on the subject, I have no doubt that time was not of the essence of the contract. It certainly was not from any of its expressed terms, and I do not think that any of the circumstances that have been placed in evidence before us shew that it was intended by the parties that it should be of the essence of the contract. The object for which the Odd-fellows were purchasing was for the purpose, at some future time, of erecting a hall; they had not made up their minds whether they were going to build then or the next year or at the expiration of their lease. They were going to secure some property, get hold of some property and make whatever they could of it in the meantime—perhaps make some alterations and utilize it in that way until the expiration of their lease, when they might come to a resolution to build a hall; but all that is quite at variance with the notion of time being of the essence of the contract, that it was to be completed on the 1st of March



without fail, and that if it was not completed on that date or within the time to which it was at the different periods enlarged, that it was to cease to operate. I am inclined to adopt Mr. Paterson's view of the contract in place of Mr. McCarthy's, and to think that it is necessary if you want to make time of the essence of the contract, that it should be by express stipulation. I do not think, however, the parties were in a position to make it of the essence of the contract by the notice that they gave. If it was not of the essence of the contract either from the nature of the property or from the terms of the contract, then the plaintiff was to have a reasonable time for carrying it out, and I do not think that a reasonable time had expired when the notice was given. During all the period from the entering into the contract, on the 17th February, down to the 7th June, the Odd-fellows were investigating the title, as they had to do, at their own expense. The delays seem to have been incurred by the defendants, and Mr. Paterson very feelingly says that he was obliged to make the requisitions and answer them himself, and he found difficulty in doing so, but we find that he was employed in that interesting position during all the time down to the 8th June.

I think that the practice of the Court as laid down in Mr. Fry's book and in the cases referred to shews that it is not necessary the plaintiff should have the full legal title in himself; that it is sufficient if he had the means of acquiring the legal title. Here he was the owner of the equitable estate, and he had a right to compel the owners of the property to convey it to him. I think that is the practice of the Court, and the form of decree in specific performance suits justifies that deduction also, because it is not whether the plaintiff had at the time of the contract a title, but whether he can now make a title. It is a question that might affect the costs of the proceedings, but it does not affect the right of the parties; they would have a reasonable time to acquire the legal estate—to clothe the equitable estate with the legal estate so as to transfer it to the purchasers.

The only other point is as to the constitution of the suit, and I think it properly framed. It is not like the case of two distinct independent contracts, for the defendants, the Griffiths, are claiming from the Odd-fellows that this contract was their contract, and that they are the persons entitled to the performance of it, and the plaintiff was compelled—it was a sort of interpleader suit, in fact—



to shew that he was as between these parties the person entitled to the contract; so that it seems to me on this ground alone, independently of the Judicature Act, that he would have been justified in uniting all these parties as defendants to the suit, in order to establish his right to the contract with the Odd-fellows, which was disputed by the Griffiths.

I thought it better to dispose of the case now, as it is only a step in the cause, and the parties will be enabled to bring it before the Court of Appeal at the next sittings.

I think the plaintiff entitled to a decree for specific performance, and as the parties have investigated the title, and they are all satisfied with the title now, there will be no reference to inquire as to title in regard to either contract. I think there are two contracts—the one between the Odd-fellows and the plaintiff, and one between the plaintiff and the Griffiths; and as to both of these the defendants have denied the right of the plaintiff to performance, I think they must pay the costs, and the plaintiff will be entitled to a decree with costs; against the defendants as to the particular contract in which they are relatively concerned. Operation of the decree stayed until the next sittings of the Divisional Court.

The defendants Griffith thereupon appealed, and the appeal came on to be argued before this Court on the 28th and 29th of May, 1884. \*

The defendants Wright and others, members of the Independent Order of Odd-fellows, also appealed, but as nothing in the appeal by the Griffiths turned upon that appeal, it is not necessary further to notice it.

*Moss*, Q.C., and *Arnoldi*, for the appellants the Griffiths

*Robinson*, Q.C., *McCarthy*, Q.C., and *J. A. Paterson*, for the Oddfellows.

*S. H. Blake*, Q.C., *J. MacLennan*, Q.C., and *W. A. Foster*, for the respondent.

The other facts and the points relied on sufficiently appear in the judgment.

\**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

October 15, 1884.—HAGARTY, C. J. O.—I do not propose to review the evidence in detail, as the learned Judge has dealt very fully with it.

The defendants Griffith chiefly base their case for relief, on the assertion that the plaintiff acted as their agent in endeavouring to effect a sale to the Odd-fellows.

This the plaintiff denies, and the learned Judge adopts his contention. He says: "I am bound to hold that there was no agency on behalf of the plaintiff with regard to the Misses Griffith."

We are pressed to overrule this finding of the learned Judge and to find the other way. A very strong case is required to induce an Appellate Court to take this course, and many cases may be referred to on this head. One of the latest I have seen is *Redgrave v. Hurd*, 20 Ch. D., p. 19. Jessell, M. R., there says: "The rule of the Court of Appeal is that when there is direct conflicting oral testimony, and the Judge who has seen the witnesses believes one party and disbelieves the other, this Court, not having seen the witnesses, cannot disturb that decision any more than it could disturb the verdict of a jury under similar circumstances."

Great weight must also be attached to what the learned Judge says as to the written evidence. After noticing the contradictions in the oral evidence, he says: "In such a case where there is a writing evidencing the relationship of the parties, the importance of it is invaluable. \* \* \* Every one of the writings, all the letters and the offers and contracts and agreements that have been put in evidence, are all consistent with the plaintiff's evidence" (a).

The memorandum of Messrs. Roaf to plaintiff in January, and the memorandum signed by the Griffiths, was an announcement to him that he could have the property for \$20,000.

The owners wanted \$22,000, but would accept the lower price if they could get no more.

The learned Judge points out with much force that it is difficult to understand the writing. On the theory of an

existing agency the parties adopted a most singular course in giving it the shape of a sale to plaintiff personally, at the lower price, to enable him to get the higher price for them.

Even if the agency had been originally created, it seems clear that on 17th February the parties agreed to sell absolutely to plaintiff for \$19,500.

Mr. Roaf's evidence is distinct as to this. So is Major Evans.

Their position is that they were induced to sell to him on his assertion that the Odd-fellows had refused to buy it for \$20,000.

Mr. Roaf's letter of 18th February to Miss Griffith, is clear that the sale to plaintiff was regarded as a final closing of the matter.

As I understand Mr. Roaf's evidence, it appears that very soon after this he was aware of the sale to the Odd-fellows, but he states that he understood that after the sale to plaintiff, the Odd-fellows had approached him and purchased at the advanced price, which he considered he could not object to; and accordingly the title was examined and deeds executed on 11th March, but not delivered, and an agreement made for the Griffiths accepting a mortgage direct from the Odd-fellows to them for part of the purchase money.

It was not, he says, till the 13th May, that he and Major Evans determined not to carry out the contract, having heard that as a fact the property had not been offered to and refused by the Odd-fellows at \$20,000, as plaintiff had represented to them on the 17th February, when they agreed to sell to him at \$19,500.

The substance of the Griffiths' defence is in effect that the sale to plaintiff individually ought to be set aside in consequence of this misrepresentation.

There is no dispute as to there being a sale in fact, with the full knowledge that it was to plaintiff as a purchaser on his own account. Any dealings by plaintiff after that personal contract with him, must not be considered as made with him as Griffiths' agent or trustee.

They say they are ready to adopt the contract for sale to the Odd-fellows, and in their solicitor's letter of June 12th notify them to that effect, stating that in selling to them plaintiff was really trustee and agent for the Griffiths. Their prayer is that their contract selling to the plaintiff may be declared fraudulent and void, and be cancelled; that they may have the benefit of the contract with the Odd-fellows; that plaintiff be declared a trustee for them; and the other defendants be decreed to perform their contract so adopted by the defendants the Griffiths.

Accepting Mr. Roaf's evidence, we must hold that as he and his clients agreed to sell to the plaintiff personally, and after knowledge of his agreement to sell to the Odd-fellows they proceeded to complete such sale, preparing and executing the deeds, and agreeing to have the \$15,000 mortgage to be made from the Odd-fellows to plaintiff to be made directly to them; their right to resist specific performance must depend, as I think, wholly on the alleged misrepresentation by plaintiff as to the Odd-fellows declining to purchase at \$20,000, when in fact on the day of closing with the Griffiths he was agreeing with the Odd-fellows for \$25,000, and signed a pre-arranged contract with them at that price on the same afternoon.

Assuming therefore that the learned Judge was right in holding there was no fiduciary relation existing between plaintiff and the Griffiths, and that he contracted with them finally to purchase at the reduced price, it still remains to consider whether the sale should be avoided for this misrepresentation as to the Odd-fellows.

Unfortunately we can find no reference to this view in the judgment below, nor any finding as to whether such representation was or was not made. We are therefore without the advantage of the learned Judge's view on this question of fact, and must decide it ourselves. I have a strong impression that the plaintiff did tell Messrs. Roaf and Evans when he made the reduced offer of \$19,500 that the Odd-fellows refused to give \$20,000. As a juror I should find against plaintiff on this. A careful perusal of his evi-



dence both at the hearing and previously before the Examiner leads me to this conclusion. The direct evidence of Mr. Roaf and Major Evans of course strongly confirms such a view.

In his examination he swore that at the time he was beating down the price to \$19,500 he had an offer from the Odd-fellows for \$25,000. He says: "I may have told Major Evans that I could not sell the property for \$20,000. I have no recollection of it. I may have said so on the 17th February when I offered \$19,500; I could not state this as a ground why I offered \$19,500. I said so because in conferring with land agents they said it was doubtful if \$20,000 could be got for it. \* \* \* I cannot state the exact words used by Major Evans, if he asked me if the sale to the Odd-fellows was off; I do not recollect positively that he did ask me. I may have told Major Evans that the parties who were buying with me would not purchase—this refers to the 17th February in Major Evans' office."

At the hearing plaintiff tried to qualify this somewhat, but as I think not very successfully.

He gives as a reason for inducing Roaf to accept \$19,500 that if he (Roaf) employed a broker to sell that property it would cost him probably the difference between that and \$20,000. On his examination being referred to he says they misinterpreted what he said. At pages 39 and 40 his explanation is given. It is to me unsatisfactory (*a*).

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(*a*) The following is part of the evidence of the plaintiff:—

"Q.—You were examined before about this; didn't you tell him now that you couldn't sell the property for \$20,000? A—I didn't. Q—Will you swear you didn't? A—I swear that I didn't tell Major Evans that I couldn't sell the property for \$20,000. A—Did you say anything about the \$20,000? A—I may have said the property was not worth \$20,000. Q—You were asked before about this, and you said "I may have said to Major Evans I couldn't sell the property for \$20,000;" do you say that is not correct? A—I say that I may have said to Major Evans that the property was not worth \$20,000; Q—Do you mean to say this is not correct what you said in your examination before Mr. Evans? A—If it is put down that way they have misinterpreted what I have said. Q—Don't you recollect that you were cautious enough to have this examination read over; this examination in chief read over to you word for word before you would give any explanation? A—Yes; and I objected to it at the time;



A careful perusal of all the evidence on this point leads me to the conclusion of fact, that Messrs. Roaf and Evans are correct in stating that plaintiff informed them that the sale to the Odd-fellows was off.

I also believe on the evidence that, apart from the existence of any fiduciary relation between the parties, Roaf and Evans were aware that plaintiff expected and was endeavouring to effect a sale of this property to the Odd-fellows, and that his so endeavouring was a subject of conversation between them.

The success or the failure of his expected sale to them would thus become a matter of much importance to all of them.

The general law is fully stated in *Kerr on Fraud*, 2nd ed., 61, 2-3; *Fry on Specific Performance*, 586.

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I told him those were not my words. Q—You objected to what? A—To that very clause. Q—And you mean to say you objected to this clause? A—Yes. Q—And that notwithstanding that it was taken down in that way, and notwithstanding that you signed it? A—You will see at the end I think the correction. Q—I want you to state if it is so that you objected to that clause at the time before the examiner, and that the examiner, notwithstanding that, kept it in there, and that you signed it with that in, in that way; is that so; do you state that to be the case? A—I state that I have no recollection of telling Major Evans. Q—Answer the question. Do you mean to say now that you objected to that statement in your examination, and that notwithstanding that the examiner would not alter it, and that you signed it with it in that way? A—For that I have no recollection of any such statement. Q—Answer the question—Yes or No? A—I have no recollection of any such conversation. Q—I want to know if you now state on oath that you objected to that in your examination, and that notwithstanding that it was taken down so, and that you signed this notwithstanding your objection? A—I say that I have no recollection of any such question. Q—You have no recollection of any such question. Then you couldn't have objected to it? A—If it is taken down in that way why they must have misinterpreted my words. Q—Now you said here at any rate—in the examination—“I may have said to Major Evans that I couldn't sell the property for \$20,000. I may have said so on the 17th February when I offered \$19,500.” Now did you give any other reason to Major Evans why this property was not worth more than \$19,500 on that occasion? A—Yes; I think—I don't know what other reasons I gave. Q—Did you say that, because conferring with land agents they said it was doubtful if \$20,000 could be obtained? A—Well, that has reference to another conversation. Q—Sure

Lord Eldon, in *Turner v. Harvey*, Jac 169, 178, says: "The Court in many cases has been in the habit of saying that where parties deal for an estate they may put each other at arm's length, the purchaser may use his own knowledge and is not bound to give the vendor information of the value of his property. As in the case that has been mentioned, if an estate is offered for sale and I treat for it, knowing that there is a mine under it, and the other party makes no enquiry, I am not bound to give him any information of it. He acts for himself and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor that principle will not be allowed to operate."

Mr. Kerr (p. 61) quotes Lord Campbell's words, in

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of that? A--With Major Evans. Q--You say here it was on the 17th February? A--I certainly was under a--Q--Under a what? A--I didn't intend to convey that if it was taken down. Q--What did you intend to convey then; what was that; explain what you intended to convey? A--I remember on one occasion conferring with other agents--with land agents, and two or three thought that \$20,000 was the outside price of the property. Q--Was that what you intended to convey? A--I don't say that that conversation took place that day. Q--You have done so in your examination; do you now say it was not so? A--Yes; I now say it was misinterpreted. Q--And you want to withdraw from that too? A--They misinterpreted my-- Q--They misinterpreted you there too? A--Yes. Q--And you say "I had an offer from the Odd-fellows of \$25,000 at that time"? A--Yes. Q--Did they misinterpret that too? A--No. Q--So that at the very time that you had this conversation, there is no doubt about that at any rate, that you had the offer of the \$25,000? A--I had the offer subject to the approval of the committee." Q--Didn't you know of a resolution of the Odd-fellows at that time? A--No; they didn't tell me of course. Q--Did you doubt that you were going to get an acceptance of that offer by the committee? A--I had my doubts. Yes. Q--Then you didn't expect at that time to get this offer carried out with the Odd-fellows? A--A committee of twelve men sometimes disagree. Q--Then you had some doubts about it had you; do you mean to convey that? A--Yes. Q--And you didn't expect--? A--I was not sure because they had been talking about property so long; I considered that a chance sale. I considered that, yes, a chance sale. Q--You didn't say anything to Roaf or Evans about this offer? A--No; not then. Q--And you asked them then to make you an offer, or agree to take \$19,500? A--I made my offer and they dealt with it."

*Walters v. Morgan*, 3 DeG. F. & J., 724: "A single word or even a nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which might influence the price of the subject to be sold, is a fraud at law. So, *a fortiori*, would a contrivance on the part of the purchaser better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of the real value, or time to deliberate and take advice respecting the condition of the bargain." See also *Brownlie v. Campbell*, L. R. 5 App. Cas. at p. 950.

The opinions of the Judges and the authorities cited in *Smith v. Hughes*, L. R. 6 Q. B., 601, on a sale of chattels, are worth perusal.

In *Dolman v. Nokes*, 22 Beav. 407, the Master of the Rolls says, after noticing the general rule: "If on the purchase there is an express statement of fact on either side which causes the contract to be made, and on the faith of which alone the contract is made, and that fact is either false, or if there is a fact which it is well known will prevent the contract, and which is suppressed for that purpose, it might render void the whole transaction, but this would depend on the circumstances and facts of the case."

The chapter (No. 2) on "Misrepresentation" in Kerr, gives a very full summary of the authorities.

*Fry*, on Specific Performance, ch. 13, on Misrepresentation, also deals with the subject. Also ch. 14 on Fraud, sec. 686-687 may be referred to. In sec. 626 it is said: "It must be remembered that it makes a material difference whether the misrepresentation in question is alleged by way of defence to an action for specific performance or to a common law action on the contract, or as the ground for an action of deceit, or for the rescission of a contract, for somewhat less than the ingredients requisite for either of the two latter proceedings will suffice to prevent the active interference of the Court in specific performance."

On this subject it is said, sec. 25: "It is said to be in the

discretion of the Court. The meaning of this proposition is not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the Court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favour. 'If the defendant (said Plumer, V. C.,) can shew any circumstance, *dehors*, independent of the writing, making it inequitable to interpose for the purpose of specific performance, a Court of Equity having satisfactory information upon that subject will not interpose.'"

In *Davis v. Abraham*, 5 W. R. 465, Wood, V. C., says: "Although the Court might absolve the plaintiff from wishing to do anything positively improper, his claim (for specific performance) could not be sustained."

My views of the case may be thus briefly stated:—

Mr. Roaf's evidence leaves no doubt on my mind, that the Griffiths understood they were selling to plaintiff personally, and further, that with knowledge of his having contracted to sell to the Odd-fellows, they proceeded to clear up the title, prepare the conveyance, and arrange as to having the mortgage to be given by the Odd-fellows made direct to them.

(2.) That at the time when plaintiff induced them to accept a reduced price, he stated to Messrs. Roaf and Evans that the Odd-fellows had refused to give \$20,000 for the property.

3. That such statement was false, and made with the design of inducing the owners to accept \$19,500, and when such false statement was made the plaintiff had arranged with the Odd-fellows to sell to them at \$25,000.

4. That as soon as the falsehood of this statement was discovered the Griffiths refused to proceed further, or to complete the sale to the plaintiff.

5. I am of opinion that such a misrepresentation on behalf of an intending purchaser is, on the evidence before us, sufficient to prevent the Court from lending its aid to



compel performance of a contract so obtained from the vendors.

As regards the Odd-fellows, the plaintiff has, I think wholly failed in establishing any of the charges of collusion or fraud stated in his bill as between them and the Griffiths.

I understood Mr. Blake, in the argument before us, to object that the main ground on which I now rest my decision was not open to the defendants on the pleadings.

Even though we do not give effect to the contention as to the existence of the fiduciary relation, I think it is sufficiently stated in the defence as to this misrepresentation.

Paragraphs 4 and 5 of the defence clearly state the misrepresentation complained of, and that by means thereof plaintiff induced the defendants Griffiths to enter into the contract at the reduced price. The reasons of appeal also rely on this.

The point was certainly argued in the Court below, and if inadmissible on any strict view of the rules of Equity pleading, I think an amendment would have readily been made. No difficulty would on that head have occurred at law.

I cannot understand why the failure to prove the alleged fiduciary relation would exclude the direct allegation of the false representation. If the latter be sufficient in itself the absence of proof of the former would not avail.

The general rule as to unproved averments of fraud or malice when enough otherwise remains to ground an action is well put in the celebrated *Swinfen v. Lord Chelmsford* case, 5 H. & N. at p. 921. The liberality of the rule is worthy of note, especially in the dark ages preceding the Judicature Acts.

I may also refer to *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 572-597; where James, L. J., says: "If the case is based on fraud the failure to prove it must be like the failure to prove any other essential ingredient, fatal; but if, striking out the charge of fraud, there is sufficient equity stated and proved \* \* \* it is a matter



only affecting costs." See also *Attorney General of N. S. Wales v. Macpherson*, L. R. 3 P. C. 268.

In the case before us the defendants fail to prove their allegation that plaintiff was their trustee, or that as such he committed a fraud on them. But if, apart from his being trustee, they state conduct of his raising a sufficient equity against him to prevent the Court awarding specific performance, I think it clearly sufficient.

I think the appeal should be allowed, with costs.

BURTON, J. A.—The defendants the Misses Griffith appeal against that portion of the decree made by Mr. Justice Proudfoot which decreed specific performance of an alleged contract to sell to the plaintiff the property referred to in the pleadings; and the defendants the Oddfellows against that portion of it which decreed specific performance of the agreement on their part to purchase it from him. If the decree upon the first point cannot be sustained it will of course be unnecessary to consider the second.

The contract itself between the plaintiff and the Misses Griffith is to be found in two letters of the 17th February, 1882; the one from the plaintiff offering to purchase for \$19,500, he consenting to search the title at his own expense and not to require any abstract of title or to require the Misses Griffith to produce any deeds or documents other than those in their possession, but to make a good title free from incumbrances, and give possession before the 24th of the same month. This was accepted by the Misses Griffith on the same day.

The allegation in the answer of the Misses Griffith that the plaintiff had been a trustee for them, and that he took advantage of that position, has no solid foundation. The trusteeship was a purely formal matter, and the fact that such a defence is set up casts a doubt upon the *bona fides* of the whole defence, and renders it necessary to scrutinize the evidence which charges him with misrepresentation with greater caution than one would perhaps have felt compelled to do if no such element had been introduced as a ground of defence.

The other material allegations of the defence are to be found in the paragraphs numbered from 2 to 9, in their original answer, in which the defendants in substance allege that the plaintiff was a member of the order of Odd-fellows, and that they supposing that he had peculiar facilities for bringing about a sale, employed him in 1881, and requested him from time to time to effect a sale of the property to that body, and instructed him to ask \$20,000.

That the plaintiff accepted the employment, and until the date of the letter I have referred to represented that he was making every exertion to do so, and that he stipulated for a commission.

That on that day he informed the defendants that he had used his best efforts to effect such a sale, and that he was unable to do so, but offered himself to purchase for \$19,500, which would be equivalent to a sale at the price previously named after deducting his commission.

That by means of these representations, and through the confidence reposed in him by reason of the premises, the plaintiff procured their execution of the letter accepting his offer.

That during the time he was so professing to act as the agent of the defendants in carrying out the sale to the Odd-fellows, he was in truth endeavoring to sell to them on his own behalf at an advanced figure, and that on the same day on which he procured the contract relied on from the Misses Griffith, he had got a verbal promise from the members of the Odd-fellows Lodge to purchase for \$25,000, and that on the same day on which the contract with the Misses Griffith was made, he got a written contract from them to purchase at that price.

If the facts be as here alleged, there can, I should assume, be no doubt of the right of the Misses Griffith to resist a suit for specific performance. But the learned Judge has found against the fact alleged, that he was acting as their agent; and the pretence that the letter of the 9th was written with the view of shewing to any one as evidencing his authority to deal with the property, is too absurd to warrant a moment's consideration.

As the learned Judge remarks, Major Evans was then aware of the desire of the Misses Griffith to get \$22,000 for this property. How an offer to the plaintiff to sell to him for \$20,000, was to assist that object, the witnesses have not explained.

What then is the evidence upon which we are asked to reverse the learned Judge's finding? The plaintiff negatives the assertion that he was acting as agent, or that he made any such representation as is set up in the answer. In this he is contradicted by other witnesses, but the learned Judge has preferred the evidence of the plaintiff, supported, as he thinks it is, by the documentary evidence; and even if we felt, upon a perusal of it, that we should have come to a different conclusion, that would be no ground, as we have repeatedly held in this Court, for reversing his decision. But it is said that although the learned Judge has found in favour of the plaintiff on the issue as to his occupying any fiduciary relationship, the representations admitted by the plaintiff to have been made were under the circumstances of a character to vitiate this contract, and that there is no express finding of the learned Judge upon that point.

No one can read these pleadings without feeling a conviction that the issue intended to be raised upon them was the abuse by the plaintiff of his fiduciary position. It may be, I do not say that it is not, open to the defendants to urge that even if the agency is not made out, there is sufficient alleged upon the answer to constitute a defence, but it has very much the appearance of allowing a defendant to go into evidence of fraud without pleading it, and I must confess I should have preferred seeing an amendment of the pleading distinctly alleging a fraud of the character now suggested, to being told that the point was argued in the Court below though not taken distinctly in the answer. The representations or conduct of an agent sufficient to avoid a contract are so entirely different from the representations or conduct which can be relied upon for that purpose in the case of a purchaser, that one would expect

to find them distinctly alleged, and if they were gone into then one cannot avoid feeling that the learned Judge, in dealing with a question with which as an Equity Judge he must be so familiar, must have come to the conclusion in favor of the plaintiff upon the facts.

The admission made by the plaintiff on his preliminary examination goes the full length of saying that he may have stated to Major Evans that he could not sell the property for \$20,000; but although he denies this—not altogether in a very satisfactory way—upon his examination at the hearing he does admit that he may then have said that the property was not worth \$20,000.

If that was the only statement, and in the face of the finding it is, I think, fair to assume that that is the only representation which was proved to the satisfaction of the Judge, can we say that that was sufficient to vitiate the sale, or was it a representation in a matter merely *gratis dictum* by the bidder, in respect of which he was under no legal duty to the sellers for the correctness of his statement, and upon which the seller would be incautious to rely?

He does admit on his examination, though the question does not appear to have been again asked at the trial, that he may have told Major Evans that the parties who were buying with him would not purchase, which was apparently false, but such a misrepresentation has been expressly held not to be fraudulent in law. See (*Vernon v. Keys*, 12 East 637.)

I do not overlook the fact that though the value of property is generally matter of opinion, a vendor may put upon the purchaser the responsibility of informing him correctly both as to its market value or any other fact known to him affecting the value of the property, and if the purchaser answers untruly it is fraud. He is not bound to answer, but if he does he is bound to speak the truth.

Here all parties knew that the price expected to be obtained from the Odd-fellows was, as Major Evans himself expresses it, a fancy price, in other words more than its



market value. The vendors knew that the plaintiff would, in the event of his purchasing, endeavour to sell to them, and that he would expect to make a profit. The learned Judge has found upon evidence which warranted that finding, upon the admission in fact of one of the Misses Griffith, that she knew of the sale for \$25,000 before she executed the deed, which would however be immaterial unless she was at the same time informed that a sale had been effected at the time she and her co-defendant contracted to sell to the plaintiff.

But the plaintiff as a simple purchaser was under no legal duty to the vendors. There is a conflict of evidence as to the statement about the sale; and the representation as to its not being worth more than \$20,000 was perhaps—if the sale to the Odd-fellows fell through—strictly true, and at the time it was made there was no binding contract for the sale to them. If that fact had been made known to the vendors they would still have been under obligation to sell to the plaintiff for \$20,000.

They were willing to sell for that sum, and they knew that unless the plaintiff became the purchaser they would have to submit to pay a commission on the sale, and this they were willing to do. No one can, I think, reasonably come to the conclusion that it was upon the faith of the representation then made by the plaintiff that the property was not worth \$20,000, and that alone, which induced the vendors to accept the reduced amount. On the whole, I am of opinion that there was no obligation on the plaintiff to disclose the verbal arrangement he had made, which was not a binding legal contract, and that if that agreement had for any reason failed the property would probably have been of no more value than represented. He assumed the risk of that contract being completed.

I fail to see upon this branch of the case any sufficient ground for interfering with the decree, but as my learned brothers are of a different opinion, it is unnecessary for me to consider the other grounds in the case.



PATTERSON, J. A.—I am of opinion that, for the reasons given by his Lordship the Chief Justice, the plaintiff ought not to succeed in this action.

I do not propose to undertake a separate examination of the evidence; and I could not attempt it with any hope of reconciling the conflicting accounts of different witnesses, or of always finding one witness consistent and intelligible throughout.

I shall content myself with stating the general view of the evidence which leads me to the conviction that the plaintiff obtained the contract he now seeks to enforce by concealment, if not by active misrepresentation, of an important fact.

I fully recognize the rules which permit a purchaser to keep silence respecting matters within his knowledge which enhance the marketable value of the property he wishes to buy, but I do not gather from the evidence that this plaintiff did so. When we are told, on the part of the defendants, the Misses Griffith, that the plaintiff represented, as an inducement to them to sell for \$19,500, that the Odd-fellows would not purchase for \$20,000, when the fact was that the plaintiff had at the time arranged to sell to that body for \$25,000, the only thing to consider is whether or not we can take that statement to be established, having regard to the evidence on both sides. If it were merely a question of credibility of witnesses, one telling one story and another contradicting it, and if the Court of first instance had judged between the opposing accounts and given credence to one and disbelieved the other, there would be ground for urging that we ought not to disturb such a decision, even though our own views might not quite coincide with it.

Dicta laying down that principle have been quoted in this Court, almost *ad nauseam*. I may, nevertheless, be permitted to recall the terms in which it was happily and succinctly expressed by Mr. Justice Strong, in one of the earliest cases decided after the constitution of the Court in its present form; *Canadian Bank of Commerce v. Wilson*, 36 U. C. R. at p. 25.

“So far as the facts depend on the credit to be given to the witnesses, the finding of the learned Judge before whom the cause was tried ought to be decisive. An Appellate Court having power to decide questions of fact is, however, bound to take into consideration all the circumstances of the case and to give effect to all the presumptions warranted by the evidence.”

But it happens that this branch of the case is not discussed in the judgment delivered in the Court below, which is occupied with the consideration of another contention of the defendants, in which we all agree that they properly failed; and the evidence of the plaintiff does not impress me as contradicting that given on the part of the defendants.

The plaintiff does not, it is true, admit that he told the defendants or their agents that the Odd-fellows refused to buy, or refused to buy at \$20,000. He does not even admit that he mentioned the Odd-fellows when he was pressing for a speedy answer to his offer of \$19,500. On the contrary, I understand his evidence to be intended as a denial of these allegations.

But he does not on the whole deny that he may have said the property was not worth \$20,000. He does not always admit that he said as much as that he could not sell it for \$20,000. He seems to have been understood to say so in his preliminary examination, and he even attached his signature to a deposition containing those words. But at the trial he maintained that he had been misunderstood, and would go no farther than to concede that he may have said it was not worth \$20,000.

Now that strikes me as a distinction without a difference. The whole talk and contemplation from the first, whether the plaintiff was agent for the defendants or a purchaser from them at arm's length, was of the Odd-fellows. The sale to them was looked on as the objective point of the enterprise. The fact that that was all the time in the minds of every one concerned may, I think, be deduced from the evidence on the part of either of the litigant

parties. That being so, it seems to me to matter very little by what form of words the plaintiff guarded his depreciation of the property. Whether he said "I cannot sell it for \$20,000;" or "It is not worth \$20,000;" the meaning palpably was "The Odd-fellows will not give \$20,000 for it."

Thus there is no real contradiction on the subject of the representation; and the fact is, in my judgment, established beyond reasonable doubt which disables the plaintiff from insisting on the bargain he is now seeking to enforce.

MORRISON, J. A.—I have had an opportunity of perusing the carefully prepared judgment of His Lordship the Chief Justice, and have only to say that I agree entirely with the views expressed by him, and concur in allowing this appeal, with costs.

*Appeal allowed, with costs; and the action in the Court below dismissed, with costs.*

BURTON, J. A. dissenting.

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SYMMERS V. LIVINGSTONE

AND

SYMMERS V. LIVINGSTONE ET AL.

*Contract to deliver goods at a named point—Change of destination at instance of purchaser—Liability for extra freight—Arbitrary freight.*

The defendants agreed to sell to the plaintiff a quantity of tow, to be delivered in the United States at a "Boston point"—that is, a point to which the freight charged was the same as to Boston, Mass. Both parties contemplated the route from the Suspension Bridge as that by which the tow would be sent, and Bellows' Falls, Vt., a Boston point on that railway system, was the place named by the plaintiff, but subsequently he desired to have the tow sent to Franklin, New Hampshire, which was not a Boston point on that railway system, and he agreed to pay the arbitrary or extra freight, which he supposed was 5 cents per 100 pounds.

The defendants accordingly consigned the goods to "Franklin, N. H.," and in the ordinary course of transport, they were taken to Boston, and thence to Franklin, N. H., where they were received by the plaintiff subject to railway charges greatly exceeding the 5 cents per 100 pounds.

It happened that Franklin was a Boston point upon the lines of railway with which the Grand Trunk Railway connected at St. Albans, and the defendants had on one occasion shipped two car loads from stations of the Grand Trunk Railway by that route, but in consequence of delays at the St. Albans' custom house, the plaintiff wrote directing the defendants to ship by the Suspension Bridge.

*Held*, that by their contract the defendants were not bound to ship to Franklin, N. H., which was not a Boston point within the contract; and that under the circumstances the plaintiff, and not the defendants, was bound to pay the extra freight.

The judgment of the Queen's Bench Division affirmed; that of the Common Pleas Division reversed.

THESE were two actions instituted by James Symmers, one in the Queen's Bench against William Livingstone, seeking to recover \$404.62, the other in the Common Pleas against John and James Livingstone, seeking to recover from those defendants \$1,188.39, these amounts being respectively claimed by the plaintiff for extra freight, alleged to have been paid by plaintiff for and on account of the defendants in the several actions.

By arrangement the evidence taken in one case was to be used in the other.

The evidence shewed that the plaintiff was a dealer in paper stock, resident in the city of New York, and that the defendants were residents in Ontario, and had a quan-

tity of coarse tow, used in the manufacture of paper, which they had been negotiating with plaintiff for the sale of to him.

Finally, on the 9th of December, 1879, the defendants John and James telegraphed to the plaintiff (at London, Ont.) as follows:

"Offer fifty tons or more paper stock forty dollars, cash, delivered, Boston points. Reply."

And on the same day plaintiff answered:

"I accept your offer, fifty tons, at forty dollars to a Boston point, cash."

[In William Livingstone's case the offer of forty dollars a ton came from the plaintiff, which Mr. Livingstone accepted.]

On the 20th December, the plaintiff wrote from New York to defendants:

"I wired you from here on the 18th, ordering you to ship in my name to Bellows Falls, Vt., and yesterday I wired you from Boston, ordering you to ship all paper stock to Franklin, N.H., and saying that I would pay the arbitrary rate to there;— said arbitrary rate is five cents per 100 pounds over Boston rates.

I hope you have taken measures to have your freight agent order any that may be on the track transferred to Franklin, N.H. Please ship all the rest, unless otherwise instructed, to my name at Franklin, N.H. Invoice, draft and B. L. to me here."

And in another letter, written on the 22nd December, he wrote:

"I hope you will bear in mind that \* \* \* I want all the paper stock to go to Franklin, N. H., instead of to Bellows Falls, Vt. I have explained to you the difference of five cents per 100 pounds in freights to Franklin, so I suppose you are satisfied on that score."

On the 28th of January, 1880, in consequence of some difficulty as to customs charges at St. Albans, plaintiff again wrote:

"If in time, please order those last 10 cars shipped to be sent *via* Suspension Bridge, if not sent that way already, as the trouble seems to be at St. Albans custom house. \* \* \* If you have any more to ship perhaps it would be well to postpone shipment for a while till we see how this present affair turns out."

On the 12th of February the plaintiff in again writing to the defendants, said:



"I have been east looking after the duty business, and can only say that so far as reported the only cars of your shipment on which the duties have been levied are the two cars from Sarnia. \* \* \* On those two cars I had to pay duties to get possession of the goods, but I paid it under protest and have appealed to the Secretary of the Treasury at Washington from the decision of the deputy collector at St. Albans. Should I be unable to get the duties refunded to me, of course I revert to you for reimbursement, as you agreed to deliver the goods at \$40 per ton, short tons; still I do not anticipate for one moment that I will be under the necessity of doing so, as I believe pressure enough will be brought to bear to have the duties refunded.

On the 16th of February the defendants answered this letter:

"Your esteemed favour of 12th to hand and noted. In reply would say we do not intend paying duties on any paper stock that we shipped, as it was stated by you that no duty was required, and it was with that understanding we sold to you."

The plaintiff acknowledged the receipt of this letter on 18th of February:

"Your favour of the 16th is to hand this morning, and contents carefully noted. Certainly I do not expect you to pay duties on the goods, but I do expect you to deliver the goods at the price you agreed to. Now you have agreed to deliver these goods at \$40 per ton, and have on each draft deducted a nominal amount of freight. As it turns out, that nominal freight is not much more than one-half the amount of freight actually paid. Your allowance for freight on the three shipments was \$863.48, and the actual freight paid on 12 cars that are to hand of the sixteen shipped is \$1,536.54, which, when the other 4 cars come to hand, will make the amount credited less by a good deal than half what you did credit. \* \* \* What I do claim is the excess of freight I have had to pay over and above what you have allowed. Until this matter is settled the balance of the stock must lie over, much as I want to have it come forward.

On the 24th of February the plaintiff again wrote:

"Yesterday I received the freight bills from Franklin, and the total amount of freight paid on the sixteen cars you shipped me was \$2063.94. Now, as you only allowed \$875.51, you are indebted to me in the sum of \$1,188.39. Instead of those cars being charged at less than invoice weight they are charged as containing 20,000 pounds besides which they were sent to Boston, and an extra \$40 per car is added on for transportation to Franklin. How or why the cars were sent to Boston before being sent to Franklin is a matter you will have to settle with your railroad people, as I have nothing to do with that. My contract with you was to deliver the goods at Franklin, N.H. at \$40 per ton, releasing you from any claim

on account of duty. I have sent to Franklin for freight bills made out in my own name, and just as soon as I receive them I will forward them to you."

On the 1st of March the defendants answered this letter, saying :

"Your favour of the 24th ult. to hand and noted. In reply would say it is not our intention that you should pay extra freight. Send us bills, and we will make it right at once. Send us also bills of lading (railway receipts), which you will observe contained the rate through. Mr. Livingstone will be in New York in the course of nine or ten days.

The actions came on to be tried at the Stratford Spring Assizes in March, 1881, before Morrison, J. A., without a jury, who, in the following September, gave judgment, directing a verdict to be entered for the plaintiff in each case for the sum claimed.

In the following term Rules *Nisi* were obtained to set these verdicts aside, and to enter verdicts for the defendants. The rule was made absolute by the Queen's Bench, [HAGARTY, C. J., dissenting]. In the Common Pleas the rule was discharged [OSLER, J. dissenting].

The other facts appear sufficiently in the judgments in the Courts below, and on the present appeal.

In disposing of these rules the following opinions were delivered by the Judges of the respective Courts.

HAGARTY, C. J.—This case was tried at Stratford before Morrison J.A., together with another suit in the Common Pleas of this plaintiff against John and James Livingstone, brothers of defendant. The evidence in that case was agreed to be read in this case, with certain documentary evidence, and a commission.

The plaintiff lives in New York, and the defendant and his brothers carry on separate businesses in Ontario. The plaintiff purchased a quantity of tow or waste paper from the defendant, which was to be delivered to plaintiff at Franklin, New Hampshire, at a fixed price per ton; he was to pay the freight and deduct the amount from the price.

The goods were received, but a larger amount of freight was demanded than the plaintiff understood was to be paid, and he had to pay this before he could get the goods.

He has paid the defendant's drafts for the price, and he now sues to recover back this extra freight, which he claims he had to pay.

On the 18th December, 1879, the plaintiff wrote to the defendant (after referring to previous negotiations) :

"I will give you \$40 per ton for all you have, delivered at a Boston point, and you can put as much or as little as you choose into the cars ; that would be your own look out. This is my best and final offer to you. I will feel obliged to you if you will reply immediately, either accepting or rejecting it. Why cannot you get the same rates as from St. Mary's and from Baden? Why don't you run down to Toronto, and settle the matter yourself?"

There had evidently been discussions between them previously as to rates, as in another part of this letter the plaintiff said: "I find it is quite impossible for me to pay your price and the freight demanded."

The "Boston point" is explained to mean any point or place to which the railway freight would be the same as to Boston itself. There are many such points.

On the 22nd of December, the defendant replies :

"I am in receipt of yours of the 18th inst, and in reply would say I will deliver the tow at \$40 per ton. You can pay freight and deduct from the same. Please send shipping instructions as soon as possible."

December 26th, the plaintiff writes :

"Your favour of 22nd accepting my offer of \$40 per ton for all your coarse tow is to hand. You will please ship it all as paper stock to my name at Franklin. N. H., and send bill of lading, invoice, and draft to me here. Commence shipping as soon as you possibly can, and try and give me some idea of how much you will have. The freight to Franklin will be 5 cents per 100 pounds higher than the Boston points, which of course we will pay."

January 5th, 1880, the defendant writes :

"Yours of the 3rd instant to hand and noted. Will ship five cars to-morrow and will have about four more at present to ship, which follow as soon as possible. Would have shipped before this, but could not get the rates low enough. The rate is to be 47c. per hundred pounds for 12,000 in a car. *I will draw on you for that much less deducted* which I hope you will see to all right."

Again January 9th, the defendant writes :

"Please find enclosed invoice of five cars of tow, which I hope will prove satisfactory to you. Will have about four cars more, which we will ship as soon as possible.

Please accept the draft drawn on you for the amount for the balance less freight and certificate."

Two bills of lading or shipping bills were produced.

The first was from the Port Dover and Lake Huron R.W. Company, dated January 8th, 1880, acknowledging receipt from defendant at Milverton Station of five cars, giving description and weight. Consignee's name and address, James Symmers, Franklin, N.H., weights in all about 64,850 lbs., marked *via* C. S. R. and N. Y. C.

The second is dated January 17th, for four cars, weight in all about 51,005, shipped by defendant to plaintiff, Franklin, N. H. This second bill has marked on it *via* Boston.

The plaintiff had sold this paper to persons in Franklin, the Winnepesaukee Paper Company, and he indorsed each bill when received to them. No rate appears marked on either of these bills.

In the Common Pleas suit it appeared on the bills of the Listowel Station of the same Railway Co., as ten cars consigned to plaintiff at Franklin; the rate is stated at 47 cents per 100 lbs.

We next find plaintiff's letter February 24th :

"Your favour of the 20th is to hand. You have sadly misunderstood my letter of the 18th.

"Yesterday I received the freight bills for the whole nine cars you shipped to my order, and it amounts to \$1,249.62. Now, as you allowed only \$526.60 on these nine cars, it turns out that instead of your having a balance coming to you you are owing me a balance of just \$723.

"This difference occurred by the railway company charging 20,000 to the car instead of the actual weight, and an extra expense of \$40 on each car from Boston to Franklin. How the cars came to be sent to Boston, I do not know and as I never ordered them to be sent there it will be for you to settle that with your R. Road people. I have sent to Franklin for a freight bill, made out in my own name, and as soon as I get it I will forward to you \* \* \* Also, send me a check on New York for the excess of freight I have paid."

It is quite clear upon the drafts drawn by the defendant on the plaintiff and his accounts, that the rate agreed by the defendant to be charged and deducted by the plaintiff from the cost of the goods was at 47c. per 100 lbs.

He evidently shipped under the impression that that was the rate of freight.

On the 15th of March the plaintiff writes, inclosing a statement of his claim against the defendant, shewing a balance of \$699.08 claimed against the defendant for freight overpaid beyond the understood amount of 47 cents.

March 18th, the defendant writes acknowledging receipt of last letter, and stating that he was trying to get it arranged; he adds :

"My arrangement with this road was 47 cents per 100 pounds for cars of 12,000 pounds to a Boston point, so you see I did not draw any more than I ought to have had. I did not get a written quotation from the agent,



but he says that was the bargain; the rate was got through Barr, the Merchants' Despatch agent at Toronto, so I will have it settled at once, hoping you will give time to get it investigated into."

It appears that defendant succeeded in getting the Railway people to refund \$302.04, which, as I understand from Barr's evidence in the Common Pleas suit, was wholly for the overcharge in weight, *i.e.*, counting each car as containing 20,000 instead of the actual weight.

The defendant sent the draft for the refunded amount in a letter of April 13th to the plaintiff, who, on April 16th, writes acknowledging its receipt and that he had placed it to the defendant's credit, but stating that it was not half his claim, and enclosing a statement crediting the draft, shewing balance still of \$404.62.

He states that he had sent to the defendant the original freight bills, and that an extra charge of \$40 per car from Boston to Franklin was made which he had to pay, and which he claimed.

May 3rd, the defendant writes:

"I am in receipt of your telegram and also your statement to-hand, and in reply would say I am willing to stick to my bargain, as you know what that is—the tow to be delivered at a Boston point or Boston. You have got all the freight on till Franklin, which you acknowledge was \$40 per car from Boston to Franklin. Please send freight receipts from here to Boston and I will make it all right at once, as our bargain was."

On the 5th of May, the plaintiff writes:

"My agreement with you was to deliver the goods at a Boston point, not at Boston, and as Franklin is a Boston point I called on you to deliver the goods there. Even were it not a Boston point you cannot charge me with the amount of freight from Boston to Franklin, as there were and are several points far nearer there than Boston, to have the cars transferred at; for instance Concord, only 19 miles away. Still, all this is nothing to me; if you did not make a through contract to Franklin that is your mistake and your loss."

By bills produced from the Merchants' Despatch Company, one for each of the nine cars, each headed "For transportation from Black Rock," in the right column these rates seem to be stated 36, 5.60, and 10.40. These, if cents per 100 lbs., would be in all 52 cents per 100. In other papers from the Merchants' Despatch Company these rates appear to be Port Dover Road 5.60, C. S. R. 10.40. The rest, I presume, is for the American line or lines. When the plaintiff paid the defendant's drafts on him, in which freight was deducted at the rate of 47c. per 100 lbs., he did not expect to have to pay any more for freight. It was shewn in the other suit that some of this stuff from John and



James Livingstone came through by other roads to Franklin for the 47c. rate.

It seems very clear that the defendant was misled by the railway agents. They told him that the rate would be 47c; and they actually marked that rate on James Livingstone's shipments. He acted on what they said: he so informed the plaintiff, and made his drafts accordingly. The defendant thought Franklin was a Boston point, and the railway agent says he thought the same. It was in fact at that time not a Boston point on the lines by which these goods were shipped, but it was such a point on the Grand Trunk line which passed through Stratford, and the Port Dover line there crosses it.

The plaintiff was under the impression that it would take five cents per hundred more to Franklin than the rate to a Boston point; and he was willing to pay this extra charge. This would only involve a charge of \$1 per ton of 20,000 lbs. on the nine car loads. This would be between fifty and sixty dollars.

The plaintiff never objected to a 47 cent rate, and was under the impression that that was the fixed rate. The defendant in his letter of January 3rd, expressly informs him that this is the rate, and that he would draw for that much less, and did so. The railway agent says that if the stuff had been shipped by another line it would go at the 47 cent rate; but as it was shipped it did not in fact go at that rate, and that he agreed to ship by the Merchants' despatch to Franklin at 47 cents. Barr, the despatch agent, says in the Common Pleas suit that he contracted with J. Livingstone at 47 cents, to be delivered at Boston points. From Listowel the route was from the Niagara frontier, by the N. Y. Central and Boston and Albany Road. He says they would take it to Boston. He spoke of their refunding for the extra weight charged, and says "the rate was right enough; the railways are generally governed by the same classifications. The course that would be pursued would be that at Boston we would hand it over to the proper company to take it to Franklin." He also says: "We agreed to take it to Boston or a Boston point:" and that they did not agree to do what the Port Dover Road did, agree to ship to Franklin at 47c.

It seems proved with reasonable clearness that the plaintiff contracted to purchase this article from the defendant, and to pay therefor \$40 per ton, on delivery to him at a Boston point. He was not to pay the freight, but merely

to purchase the article and pay on delivery. The defendant would have to bear the cost of carriage to such point. It is clear that the plaintiff was to name the point of delivery; it is also clear that the price was fixed on after discussion between the parties, the defendant having to consider, in regulating his acceptance of any offered price, what it would cost him to bring the goods to the place of delivery. He agrees to the price offered after apparently satisfying himself as to cost of transport, and after being informed that the plaintiff required delivery at Franklin, declares that 47 cents will be the freight, and authorizes plaintiff to deduct that amount from the price to be paid, and after notifying the shipments draws on him on that basis. It appears to me that after accepting the plaintiff's offered price deliverable at Franklin, the whole burden of arranging for the freight and fixing the cost thereof rested on him, and not on the plaintiff; the latter had merely to accept and pay the stipulated price.

It is quite true that the plaintiff was willing to pay an extra 5 cents if Franklin were not a Boston point, but that small amount was nothing to the large sum he afterwards had to pay in order to obtain a delivery of his goods from the carriers whom the defendant had employed, and which the plaintiff had to pay in order to enable him to fulfill his contract of sale to the paper company at Franklin. In the view I take of the position of the parties it is useless to discuss whether Franklin was or was not a Boston point on any particular line of railway. The defendant accepted it either as being a point, or on the plaintiff's representations of his willingness to pay the extra 5 cents per 100 pounds if necessary, and then finally arranges for a 47 cent through rate, which he communicates to the plaintiff.

It is not for us at present to discuss whether the defendant has or has not a valid claim against the Railway Company to whom he delivered the goods for the excess over the 47 cent rate. I think it was a wrong on the plaintiff to compel his payment of these charges. Strictly speaking he was to pay nothing but the price. By special arrangement he was to pay a named charge out of the price or deduct it from it for the defendant's convenience. He had in fact paid the price before actual receipt of the goods, and then finds he cannot get possession of them without paying this extra sum.

I think he is entitled to recover back the amount found by the learned Judge at the trial, either on the common

counts or on a special count framed to meet the actual contract, as clearly shewn by the correspondence between the parties. It is not very clear how this overcharge is made up; it may be the \$40 per car on nine cars from Boston to Franklin, which would be \$360. The verdict was entered for \$404.

I have felt much embarrassed by the manner in which the case comes before us. It was not tried separately, but after the evidence was given in the Common Pleas case against the defendant's brothers it was agreed that this case should be governed by the evidence given there. Some of that evidence would have been inadmissible against this defendant. I have also felt that further evidence might have been given to explain how it was that the American railways did not recognize the rate here apparently agreed on. We communicated with the counsel, offering to receive further evidence, but none has been offered, and we have been given to understand we must not expect anything further.

It was suggested that proof should have been given as to the charges paid by the plaintiff being proper charges, as he should not have paid any improper rates demanded, or that he should have refused to receive the goods, &c. I think we cannot assume that the rates were illegally or improperly demanded from or paid by him, and that *prima facie* he was compelled to pay what we may assume to be the carriers' usual charges. If those charges exceeded the amount agreed on, I think it is the defendant's and not the plaintiff's fault and loss.

Regarding the transaction between them as a contract by the defendant to deliver goods to the plaintiff at a fixed price and fixed rate of carriage, which fixed rate plaintiff was authorized to pay out of the purchase money, I think any higher rate which the plaintiff had to pay to get his goods can be recovered against the defendant.

CAMERON, J.—The defendant agreed to sell and deliver to the plaintiff all the tow or paper stock he had at the rate of forty dollars per ton, deliverable at some point to be indicated by him to which the rate should be the same as to Boston from the point of shipment in Ontario; and he arranged with the Merchants' Despatch and Transfer Company to carry the tow at the rate of forty-seven cents per 100 pounds to Franklin, N. H., which upon the evidence would appear to be a Boston point for goods shipped by

the Grand Trunk Railway, but not by the Port Dover and Lake Huron Railway, by which the carriage of the tow was commenced, or the lines to which it was by that Company transferred. The plaintiff was under the impression that Franklin N. H., was not a Boston point, and that the freight from a Boston point to Franklin would be five cents per 100 pounds; and he was to pay any such rate.

The defendant advised the plaintiff of the shipment, as they were made, two in number, of four and five cars respectively, and of the rate of freight as above mentioned, and drew for the price of the quantity shipped less the freight, having annexed the shipping receipt or bill of lading to his draft. These the plaintiff by indorsement transferred to the Winnepesaukee Paper Company, to whom he sold the tow.

By some blunder or mistake of the Merchants' Despatch Company the goods were forwarded to Franklin by way of Boston, and the Railway Company delivering the tow at Franklin demanded additional freight, at the rate of \$40 a ton, charged at 20,000 pounds to the car instead of the actual weight, which was 12,000 pounds to the car. The Winnepesaukee Paper Company paid and charged the freight so paid to the plaintiff, who seeks by this action to recover it from the defendant.

The Railway Company, after this suit was brought, admitted its error as to the weight and refunded to the plaintiff 3802.04, which he has credited to the defendant, and the question for the decision of the Court is, is the plaintiff entitled to recover the money paid by him for freight over and above the 47 cents per hundred pounds agreed by the defendant to be payable by him? The declaration is on the common *indebitatus* counts, the action having been brought and declaration filed before the Judicature Act of 1881 came into force, the only counts applicable to the plaintiff's claim being those "for money payable from the defendant to the plaintiff for money paid by the plaintiff to (should be *for*) the defendant at his request"—"and for money had and received by the defendant for the use of the plaintiff."

Under the first, money paid for the defendant at his request may be recovered, and under the latter, money received by the defendant to be applied for the use or benefit of the plaintiff. It need not be expressed, but the request may be implied from the circumstances; and under the first, money paid to the carrier, if the request of the



defendant so to do existed in fact or by implication, may be recovered, and under the latter the money received by the defendant through means of his draft on the plaintiff, if received to be applied in payment of freight, may be recovered. The actual request of the defendant in this case, was to pay freight at the rate of forty-seven cents per hundred pounds, but for this amount the defendant left sufficient of the purchase money in the hands of the plaintiff, and the money paid to this extent was in fact the defendant's and not the plaintiff's. It therefore becomes necessary to see whether the payment in excess of the forty-seven cents per hundred pounds was made under such circumstances as will raise the implication in law of a request by the defendant to the plaintiff to pay the same.

In *Exall v. Partridge*, 8 T. R., 308, it was held that a stranger who had goods lawfully on certain premises in respect of which rent was due from three persons to the landlord, distrained to pay the rent, could recover against the three although one of them had transferred his interest to the other two, as they were all liable to the landlord, and the goods having been lawfully distrained the payment of the rent to relieve them could not be considered voluntary. Lord Kenyon, C.J., at page 301, said: "It has been said that where one person is benefited by the payment of money by another, the law raises an assumpsit against the former, but that I deny. If that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my debtor *nolens volens*." The word "debtor" here is evidently a mistake and should be "creditor." Grose, J., said: "The plaintiff could not have relieved himself from the distress without paying the rent; it was not a voluntary, but a compulsory payment. Under these circumstances the law implies a promise by the three defendants to pay the plaintiff, and on that ground I am of opinion that the action may be maintained." Lawrence, J., "One of the propositions stated by the plaintiff's counsel certainly cannot be supported; 'that whoever is benefited by a payment made by another is liable for an action of assumpsit by that other;' for one person cannot by a voluntary payment raise an assumpsit against another."

In all the cases that I have been able to see, an action for money paid to the use of another is not maintainable unless there was some obligation on the part of the party paying to pay or he was by compulsion of law or duress of property



forced to pay, and the party for whom the money is paid is ultimately liable to pay the party paid. It appears to me none of these requirements exists in the present case. There was no obligation on the part of the plaintiff to pay the carriers the freight claimed, and as he has not entered into any contract to do so, his goods were not distrained or taken under lawful authority for any sum that the defendant was bound to pay to any one else. Unless the defendant performed his contract and caused the goods sold to the plaintiff to be delivered at Franklin, N.H., free of all charges of freight, or, what is the same thing under the circumstances, only subject to forty-seven cents per 100 pounds, the plaintiff was not bound to accept the goods, and could have maintained an action for damages against the defendant, not to recover the large amount of freight that was charged against the goods nearly one-half of which there was no pretence for,—I refer to the charge of 20,000 pounds instead of 12,000 per car—but for what it would have cost him to have supplied himself at Franklin with the same quality and quantity of goods, taking the market value of the goods at the time they should have been delivered. The plaintiff could not by any act of his enhance his damages or impose any greater burden upon the defendant than he would have been subjected to if he had entirely failed to perform his contract. He was not justified in taking the goods from the carriers and paying them freight largely in excess of the sum the defendant notified him the goods were subject to, without advising the defendant of the claim made by the carriers.

The defendant established by evidence at the trial that the goods were to have been carried at the agreed rate of freight, and having left the amount in the possession of the plaintiff to pay, he stands in the same position as he would have been in if he had paid the agreed rate to the carriers in advance, and in no sense can it be said that the plaintiff paid the money he now seeks to recover at the request of the defendant or by reason of an obligation resting upon him to pay it. Neither can he recover under his count for money had and received, as no money was paid to the defendant for the purpose of paying freight or to be otherwise applied than in payment of the price of the goods after deducting the freight at the rate agreed upon with the carriers, nor can the plaintiff recover for any breach of the special contract, for the defendant's contract was only to deliver the tow at Franklin, which he

did, and it was the plaintiff's own act in accepting the goods and paying the freight demanded in excess of the freight agreed on with the carrier without informing the defendant of the demand, which caused the difficulty.

To put the case as stated before. If the defendant had paid the freight to the carriers at Milverton, the place of shipment, in advance, could the plaintiff be permitted to pay it again because the carriers demanded it, without any communication whatever with the defendant? If he could, then no matter how unlawful the demand was, he could saddle the plaintiff with its payment, leaving him to seek indemnity from the carrier. I think he can have no such right in the absence of an agreement on the part of the defendant or notice thereof by the plaintiff. I think the latter could have paid the freight and charged the defendant with the amount, as sending the tow forward without advice subject to freight an implied request to the plaintiff from the defendant to pay the freight would or might exist, but the existence of the special agreement and notice to the plaintiff prevent such implication arising.

If the plaintiff's contention is to be supported the tow might have gone to New Orleans and back to Franklin with the freight of all the railways carrying it charged against it, which might far exceed the value of the goods, through some blunder of the carrier, and it appears to me absurd to say the plaintiff would be at liberty to pay such charge without notice to the defendant, and thus subject him, though doing all he could to perform his contract, to a heavier liability than he would have incurred if he had willfully refused to perform it. The value of the tow at the agreed price less freight was \$1,766.78; the freight at the agreed rate \$550.54, making the sum payable by the plaintiff under the contract \$2,317.32 at \$40 per ton. The freight claimed to have been paid by the Winnepesaukee Paper Company and charged to the plaintiff, and claimed in this suit from the defendant, was \$1,249.62, being \$699.08 in excess of the freight the defendant agreed to pay. Of this excess the Railway Company refunded \$302.04, leaving \$397.04 with interest, the amount the plaintiff seeks to recover. This excess arises, as I understand the facts, from the Merchants' Despatch Company, the carriers making the contract with the defendants, having taken the goods to Boston, and thence to Franklin. The Railway Company carrying from Boston charging for the distance, about ninety miles, a rate of \$40 a ton, very

nearly equal to the freight from Milverton in Canada to Boston. It would seem clear that the Merchants' Despatch Transportation Company were bound to carry the tow to Franklin at the rate of 47 cents per hundred pounds, and if they or their agents demanded more than that rate they demanded more than they had a right to receive, and, unless they can establish more than was shewn in evidence in this case, they would be liable to refund the amount to the party paying it.

The plaintiff, I think, by the course he pursued has precluded the defendant from making a claim against the Company, and he should be left to seek redress direct against those who improperly received the money, if it was improperly received, and if not he should bear the burden he has brought upon himself by accepting the tow through his vendees, the Winnepesaukee Co., without taking any notice of the defendant's agreement as to the freight.

The judgment for the plaintiff should be set aside, and judgment for defendant entered for his full costs of defence,

I refer also to *England v. Marsden*, L. R., 1 C. P., 529. and *Johnson v. The Royal Mail Steam Packet Co.*, L. R., 3 C. P. 38, as sustaining the view I have endeavoured to present of the law applicable to the circumstances of the present case.

ARMOUR, J.—I agree in the conclusion at which my Brother Cameron has arrived, for the reasons which he has given, and also for the reason that I do not think that Franklin was established by the evidence to be a Boston point within the meaning of the contract, in which case the plaintiff would, in my opinion, be himself liable for the extra freight.

IN THE COMMON PLEAS CASE.

WILSON C. J.—The plaintiff's right to recover and the amount of his recovery must depend, in my opinion, upon the amount the defendants would have been liable for to the railway company upon a lien claimed by the company against them, or if they had brought an action against him as consignee for payment of the freight now in question.

The agreement between the plaintiff and the defendants was, that the plaintiff should in respect of the goods pay the freight, which the defendants stated to him would be 47c. on the 100 lbs. of goods, and the defendants would recoup him for it by deducting the freight so paid from the price of the goods. The defendants were therefore, in effect to

pay the freight, and they must pay it to the plaintiff if they would have been liable to pay it to the railway company.

The defendants sent the goods by the Merchants' Despatch Company, which company transacted all their business with the Great Western and Canada Southern lines. These lines had no connection with any line which had a station at Franklin, N. H., but Franklin was nevertheless a Boston point by the Grand Trunk line, and if the goods had been sent by the Grand Trunk, as the two car loads from Sarnia were sent by the defendants before that, they would have reached Franklin for the 47c. per 100 lbs. Instead of reaching Franklin by a direct route they were carried to Boston, and from thence transmitted to Franklin, and it is for the freight between these two places the action is now brought. The plaintiff had nothing to do with the carriage of the goods. All he had bargained for was they should be delivered to him at Franklin, a Boston point. It was the defendants' act to forward and deliver the goods, and in so doing they could select and did select such line of road as they pleased.

The two receipts or shipping bills which cover the goods in question were given by the Port Dover and Lake Huron Railway Co. to the defendants for the goods which the defendants delivered to that company to carry, and the company were to deliver the goods at Franklin, N. H. Upon these bills is marked 47c. per 100 lbs., but these bills contain "a special notice" that "rates and weights entered on receipts or shipping bills will not be acknowledged."

In my opinion that leaves the rates quite at large. But if it did not, it could not be binding upon the other three railway companies on whose lines the goods were carried, and the papers put in shew these other companies did not in any way regard the rate of 47c. It does not even appear these other companies ever saw the shipping bills upon which the 47c. rate was marked; and in my opinion, the defendants were bound to shew, as they relied on the 47c. being the maximum charge, and that the other railways were acting wrongfully in charging more, that these railways were bound, impliedly or otherwise, that is by notification of the 47c. being upon the bills, and by their course of trade, that they treated such notification as binding upon them to limit the total carriage rate to the point of delivery to that sum.

The defendants may have made a special bargain with the original company, the Port Dover Railway Company,



to carry throughout for the 47c., but that could not be binding upon the other companies unless they were assenting parties to contracts of the nature which the Port Dover Railway Company should make.

In the absence of that evidence, and no evidence that the rate of \$40 a car from Boston to Franklin is more than the ordinary rate, there is no reason why the railway which actually carried the goods between these two places should not recover the amount from the consignor, or from the consignee upon his accepting the goods, or why they may not exercise justly a lien for such freight. If the railway company which carried the goods could recover the freight between Boston and Franklin, from or could support or defend a lien for such freight against the defendants, the plaintiff was justified in paying it, and it became and was a payment to the use of the defendants. It was in such a case in no sense a payment by the plaintiff to the use of the railway company. If the company had wrongfully charged beyond the proper rate, the excess would, if paid by the plaintiff, have been a sum which the plaintiff could recover from the company as money had and received to the plaintiff's use. If in fact the railway charge was rightful, the plaintiff might safely pay it and recover it from the defendants, because they were liable to the railway company for it. If it were not a rightful charge the plaintiff could not sue the defendants for the overcharge, but would have to look to the railway company for it.

In my opinion the railway charge was a rightful charge against the goods, which the plaintiff was warranted in paying, and which the company could have made the defendants pay if the plaintiff had refused to take the goods, and, as the plaintiff paid it he can recover from the defendants, who must look for redress, if they have any, from the Port Dover Railway Company.

Order absolute to reduce the verdict by \$612, and discharged as to residue, with costs.

GALT, J., concurred with WILSON, C. J.

OSLER, J.—I think the defendants are entitled to succeed. We must look at the contract between the parties and what was done in carrying it out.

The defendants agreed to deliver to the plaintiff a quantity of green tow, at some point to be named, to which the freight should be the same as to Boston.



The price was to be forty dollars per ton delivered at such point. The defendants were to pay the freight by deducting the amount from the price; and to draw on the plaintiff for the balance, and send him the invoice and bill of lading, at New York.

They made an arrangement with Mr. Barr, the agent of the Merchants' Despatch Company, for a through rate of 47 cents per 100 lbs., not to Boston, but to a Boston point.

Franklin, N. H., does not seem to have been mentioned, and Barr says he did not know anything about Franklin till this shipment was made.

The defendants then shipped the goods on the Port Dover and Lake Huron Railway at their Listowel station *via* Merchants' Despatch to Franklin, N. H., at a through rate of 47 cents. That arrangement appears to have been made between Livingstone and a Mr. Scott, who was then the general freight agent of the railway company, but neither of them was called as a witness at the trial.

J. B. Jackson, the station agent of the railway company at Listowel, said that he understood from the papers that came into his hands that an arrangement had been made for the present on their line at the rate of 47 cents to Boston or some Boston point. He did not know whether Franklin was a Boston point or not. He put down the rate, 47 cents through, on the understanding that Franklin was a Boston point. He did not know whether the defendants understood it to be a Boston point: he considered it so. He received his instructions from Mr. Scott, the general agent.

There was no agreement, therefore, with the Merchants' Despatch for a through rate to Franklin at 47 cents, but only to a Boston point, and the shipping receipt given by the railroad company is subject to the special notice and condition that rates and weights entered on the receipt or shipping bill will not be acknowledged, so that the defendants cannot rely on that as a contract to carry for the rate mentioned.

It should have been made clear what arrangement, if any, existed between the Merchants' Despatch and the Port Huron road, and whether a through rate could have been given at Listowel by that road which would bind the other railways over which the goods passed.

The only agreement found to have been made with the railway company was to carry to Franklin *via* Merchants' Despatch on the understanding that Franklin was a Boston point with that company, which turns out not to have been

the case. So far as the evidence goes it would appear that the defendants could not have insisted on having their goods delivered at Franklin at 47 cents, that not being a Boston point, but were liable to pay the extra freight from Boston incurred by the unfortunate mistake to which they, for anything I can see, contributed quite as much as either the Despatch Company or the Railway Company, for they should surely have ascertained that the route for which Barr was giving them the rate would ensure delivery at Franklin as a Boston Point.

The goods having been shipped, the invoice, bill of lading, and draft for balance were sent to New York, and the plaintiff accepted and paid the latter, and, although the rate of freight appeared on the bill of lading, he, or the Winnepesaukee Paper Company, his vendees, afterwards paid the whole freight charged, including the extra \$10 per car from Boston, and the extra weight, that is, the difference between the 12,000 and 20,000 lbs. per car.

If the goods had become the property of Symmers, under the circumstances I have mentioned, it appears to me that that fact, combined with the defendants' liability to pay the increased freight, would have warranted him in paying the freight to relieve his goods therefrom. But if the property in the goods had not passed, and undoubtedly it had not, I cannot see that the plaintiff was under a legal compulsion to pay anything.

He had the right, and as between him and the defendants it was his duty, to pay that part of the price which had been left in his hands for payment of the freight if the goods could have been obtained by paying that sum, but on what legal principle had he a right to charge the defendants with more? If the result was that the goods were not delivered, he might have brought an action for breach of contract, and might have recovered back the price paid and damages in addition, which might have been considerably less than the extra freight: *Mayne on Damages*, 3rd ed., 157. He had no right in order to obtain these particular goods to do anything which might enhance the damages ultimately recoverable against the defendants for the breach of contract, which it seems to me was the limit of their liability.

The indorsing and sending forward the bill of lading is not to be construed as a request to pay whatever the goods might be charged with, but was rather an intimation not to pay any more than the rate mentioned therein.

I do not think it can be denied that this action would

not be maintainable at all if the defendants were not liable to pay the extra freight, but their liability alone will not do.

The plaintiff had no right to pay defendants' debt merely because they owed it. Two ingredients must combine to confer that right, the latter of which is here wanting; (1) the defendants' liability, and (2) that the plaintiff's goods were under restraint therefor.

There was here, in my opinion, no request, express or implied, to advance the extra freight.

I refer to *Johnston v. Royal Mail Steamship Company*, L. R. 3 C. P. 38, Smith's L. C., 8th ed., p. 156.

I think, therefore, the rule should be made absolute to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants, with costs.

In any case the verdict should be reduced by the \$612 charged for the extra quantity. That was admittedly a charge for which the defendants were not liable under their contract with the Merchants' Despatch and the Railway Company; and it appears that the former are ready to repay it to the parties entitled to it, who are not the defendants.

Thereupon the unsuccessful party in each action appealed.

The appeals came on to be heard before this Court on the 3rd of September, 1884.\*

*Bethune*, Q.C., and *Delamere*, for Symmers. The agreement entered into by the Livingstones was to deliver the property purchased at the Franklin station, in New Hampshire, and which it was alleged was a Boston point, free of all charges at the price stipulated for; and that agreement so entered into was not varied in any respect, unless it be said that Symmers subsequently undertaking to pay the extra freight of five cents a hundred, mentioned in his letter of 26th December, 1879, was a variance thereof.

The only other agreement as to Symmers paying freight was that, at the suggestion of the Livingstones, he should pay the freight, they drawing upon him for the price of the

\*Present—BURTON, PATTERSON, JJ.A., FERGUSON and ROSE, JJ.

goods consigned, less the amount of such freight. This may be said to have been done for the accommodation or benefit of the shippers; or, placing it at the lowest, it was in reality a mutual convenience.

In pursuance of this arrangement the consignee actually paid the freight before delivery of the goods consigned, and then, having made this advance, he discovers that before he can obtain possession of his goods he must pay the additional charge of \$40 per car; and he now seeks by these proceedings to obtain repayment of the money so advanced to the railway company, who may be considered the agent of the shippers in order to carry out their contract to deliver the goods sold at Franklin.

Under these circumstances, a request from the Livingstones to Symmers to pay the amount advanced by him to the company may readily be implied.

*Robinson, Q. C., and J. P. Woods*, for the Livingstones. The agreement which the vendors made was to deliver the goods at a Boston Point (as shewn by the telegrams and letters set out), at the price agreed upon, and they were to ship according to the instructions given by Symmers. Symmers directed the shipment of the goods to Franklin, N. H., and was himself to pay the freight from any Boston point to Franklin, and he stated such extra freight, or, as he terms it, "arbitrary freight," to be five cents per 100 pounds; but whether five cents or \$5 per 100 pounds, the vendors had nothing to do with it. Under the instructions received from him they acted reasonably in shipping in the manner they did, that is, by way of the Niagara Frontier, and if plaintiff had desired to have the goods sent by any particular route he should have so directed in his shipping instructions. It is plain that Symmers had in contemplation a route on which Franklin was not a Boston point and he cannot now be heard to say that the consignors could have shipped by some particular route on which Franklin was a Boston point. It is clear that Franklin was not a Boston point within the meaning of the arrangements between the parties.



The witness Barr, agent of the Merchants' Despatch Company, states in his evidence that he had been engaged twenty-six years in railroading in Canada, and that under the directions of Symmers Boston was the proper place to which the goods ought to have been shipped.

Symmers evidently regarded the Niagara Frontier as the proper route to ship by ; and he had notice of the freight rate obtained by the consignors from Milverton and Millbank to Boston points, namely 47 cents per 100 lbs., and he was not requested by and had no authority from them to pay on their behalf to the carriers or otherwise any sum beyond that. The evidence clearly shews that the amount sued for was paid solely for freight between Boston points and Franklin, for which the Livingstones never were responsible, and which freight Symmers had himself agreed to pay.

No bad faith is here imputable to either party. It is, therefore, simply a question which of two innocent parties should be bound to sustain this loss. It is unreasonable to suppose that persons in the position of the Livingstones, resident in Canada, should be assumed to be more conversant with the workings of the railways of New Hampshire than Symmers, who was in the immediate neighbourhood, and constantly transacting business with those companies.

On the whole, it is only reasonable that no recovery whatever should be had against the vendors ; and, therefore, that in both cases the judgment should be for the defendants.

October 30, 1884. BURTON, J. A.—In this appeal from the judgment of the Queen's Bench Division, I am of opinion that the decision of the majority of the Court was right, and should be affirmed.

Some negotiations had apparently been going on previously to the 18th December, 1879, when the plaintiff wrote referring to a telegram which he had received from the defendant dated two days previously, in which the plaintiff stated that he found it impossible to pay the defendant's price and the freight demanded, adding :



"If you can obtain the same rates as your brothers have got, or can get ten tons into a car, I can afford to pay both your price and the rate of freight demanded, but not otherwise."

And he then made an offer in these words :

"*I will give you \$40 per ton for all you have, delivered at a Boston point, and you can put as much or as little as you choose into the cars; that would be your lookout. This is my best and final offer to you. I will feel obliged to you if you will reply immediately either accepting or rejecting it.*"

Adding :

"Why cannot you get the same rates as from St. Mary's and from Baden? Why don't you run down to Toronto and settle the matter yourself?"

To this the defendant replied on the 22nd December :

"I am in receipt of yours of the 18th inst. to hand, and in reply would say : *I will deliver the tow at \$40 per ton ; you can pay freight, and deduct it from the same. Please send shipping instructions as soon as possible and oblige.*"

This then formed the contract, which was a very simple one, viz :

That the defendant agreed to sell and deliver all his tow at a Boston point for \$40 ; the plaintiff agreed to accept delivery at such Boston point and to pay \$40 per ton ; and the defendant authorized the plaintiff to deduct the freight from the price. The letter accepting the offer requested the plaintiff to send shipping instructions.

The term Boston point is shewn by the evidence to mean points on the railway system to which the railway charge was the same as to Boston. The particular point to which the goods were to be sent was left to the discretion of the plaintiff, and it was a matter of no importance to the defendant, as the freight payable by him was the same whatever point might be selected.

At this date, therefore, the contract was simply to deliver at some Boston point to be selected by the plaintiff ; and on the 26th December he writes giving no direction as to

what Boston point the goods should be sent, but requesting him to ship it to him at Franklin, N. H., which was not, according to his idea, a Boston point, and was not in fact a Boston point upon the system of railway by which the tow was sent. He had on a previous occasion to pay five cents per 100 lbs. extra on goods to that point. And in his letter he adds, therefore,—

“The freight to Franklin will be five cents higher than to Boston points, which of course we will pay.”

On the assumption that Franklin was not a Boston point, the defendant was not bound to accept this variation in the contract, but it was a matter of no moment to him if the extra expense had to be borne by the plaintiff. Accordingly we find him on the 5th January, 1880, writing to the plaintiff in reply to a letter not in evidence, in this way :

“Yours of the 3rd inst. to hand and noted. Will ship five cars to-morrow; and will have about four more at present to ship, which will follow as soon as possible. Would have shipped before this, but could not get the rates low enough *The rates are to be forty-seven cents per hundred pounds for twelve thousand in a car. I will draw on you for that much less deducted, which I hope you will see to all right.*”

It is contended, without, I think, much reason, that this letter shews an abandonment of the original contract, and an agreement to ship to Franklin, although admittedly in their opinion not a Boston point, at the same rate of freight as to a Boston point.

In other words, we are asked to believe that although there was a through rate to Boston points of forty-seven cents, and although the defendant had experienced some difficulty in getting that allowed to him at the shipping point on the Huron and Port Dover Road, where he carried on business, and although the plaintiff had told him that to send on the goods to Franklin would be five cents more, he was willing to deliver at that point at the same rate as he would have to pay to a Boston point—in other words,

to lose that sum on each one hundred pounds of freight shipped.

Is it not asking us rather too much to assume that when the plaintiff writes what is in effect this; I have no right to ask you to send to Franklin, which is not a Boston point, but you need not object on that account as I have ascertained what the additional freight will be and will pay that myself, and when the defendant agrees to that variation, he shall be held to have done so except upon the terms referred to in the plaintiff's proposal, that such change in the contract shall impose no increased liability on the defendant, and this simply upon the P. S. in the defendant's letter, which is consistent with the fact, and consistent with the original contract; the fact being that he arranged a through rate for Boston points at 47 cents and the contract being to carry to one of those points, though varied upon the understanding that the additional freight should be borne by the plaintiff.

If the contention of the plaintiff be correct, that he was to pay the five cents and no more, which has nothing whatever to support it either in evidence or in reason; if that was the plaintiff's idea, how comes it that 47 and not 42 cents were deducted in each case. The plaintiff must have known on the receipt of each invoice that the defendant was submitting to the payment of five cents per one hundred pounds on each shipment, which ought to have been paid by himself.

The truth manifestly is, that the plaintiff had failed to ascertain with sufficient certainty what the arbitrary rate from a Boston point was, and when it so far exceeded what he had supposed it would be he seeks to fasten it on the defendant.

One cannot read the correspondence without being struck with the disingenuousness of the plaintiff, and also that no inference unfavourable to the defendant should be drawn from the so called admissions so much relied upon in argument.

Upon the plaintiff's first discovering the discrepancy in

the freights, he wrote to complain of it to the defendant, pointing out that it arose from what was proved to be a mistake on the part of the railway in charging 20,000 lbs. to the car instead of actual weight, and an extra expense of \$40 per car from Boston to Franklin. He does not then say that the defendant was bound to deliver free of freight at Franklin, but he says he does not know how the cars came to be sent to Boston as he never ordered them to be sent there. But whose fault was that? He had the option of selecting any Boston point most suitable for transshipment to Franklin, and if he did not avail himself of that option but left it to the railway people, surely the defendant ought not to be blamed. Besides, it is not shewn that the rate from any other Boston point would have been less.

It is true that on the 5th of May the plaintiff shifts his ground, and for the first time claims that the defendant's agreement was to deliver to a Boston point—not Boston—which reasoning is not convincing; but he goes further, and claims that, as Franklin is a Boston point, he called on defendant to deliver the goods there. Whatever may be the merits or value of this discovery in a legal point of view, it is wanting in the element of truth. The letter directing the shipment to Franklin shews most unmistakably that the plaintiff did not consider it a Boston point, but on the contrary admitted that it was not, and held out as an inducement to the defendant to ship there, that he would bear the additional freight.

The fact that there were other points on the road nearer to Franklin than Boston does not affect the argument if Franklin was not a Boston point, as it was the duty of the plaintiff, not of the defendant, to select the point to which he desired the goods sent; but the fact of the place being nearer is by no means a safe criterion in coming to a conclusion that the rate of freight would be less.

But I do not think that the fact, if it be a fact, that Franklin is a Boston point on the Grand Trunk railway or some American road running in connection with that railway, is necessarily fatal to the defendant. The plain-



tiff knew that the defendant was shipping by the Port Dover railway, and the railway with which that railway had business connections, and it is not in evidence that that railway could have granted a through rate over the Grand Trunk to Franklin as a Boston point.

If it had been shewn that at the time the contract was entered into the plaintiff knew that Franklin was a Boston point on the Grand Trunk, his letter would be conclusive against him as shewing that he did not make the contract in reference to places which were recognized as Boston points on that railway, but in reference to places which were so recognized upon some other system of railways, and that Franklin was not one of these; but although he was not then aware of it, it is reasonable to infer that what he had in his mind when referring to Boston points were points which were so regarded by the New York Central Railway, for his information as to the five cents arbitrary rate was derived from having had to pay that rate on freight conveyed over the New York railway, over which railway the tow in question was being sent; and the defendant, acting upon the plaintiff's own admission that Franklin was not a Boston point, might properly assume, even if he knew that it was a Boston point on another system of railways, that it was not by that system of railways that the plaintiff desired or expected the tow to be sent.

Franklin was not in my opinion a Boston point within the terms of the agreement, and there never was any liability on the part of the defendant to pay the freight to it from a Boston point.

I think, therefore, that the plaintiff failed to establish any liability on the part of the defendant, and the appeal must be dismissed.

PATTERSON, J. A.—I think the judgment of the Queen's Bench Division ought to be affirmed, for the reasons given by the two learned Judges, Cameron and Armour, who formed the majority of the Court.



The reason given by Mr. Justice Armour, in addition to those dwelt on more strongly by Mr. Justice Cameron, namely, that Franklin was not shewn to be a Boston point within the meaning of the contract, is, I think, sufficient for the disposition of the action.

The whole matter seems to me to turn upon the proper apprehension of what the contract was. The opinions of the learned Judges who gave judgment in this action, as well as of those who formed the Divisional Court of the Common Pleas Division when the similar action against J. & J. Livingstone was argued, differed so much upon this point, that I shall attempt to state my own understanding of it, but I shall do so as shortly as I can, because I agree with the views which my brother Rose has expressed in the judgment which he has prepared, and which I have had an opportunity of seeing.

The negotiations between the plaintiff and defendant appear to have begun on the basis of the purchase by the plaintiff of the defendant's tow at Milverton and Millbank, the plaintiff paying the freight from those places. This I gather from the plaintiff's letter of 18th December, 1879, in which he says to the defendant: "Your telegram of the 16th is to hand this morning. After entering into a very careful calculation I find it impossible for me to pay your price and the freight demanded. If you can obtain the same rates as your brothers have got, or can get ten tons into a car, I can afford to pay both your price and the rate of freight demanded, but not otherwise. I would like to buy your tow, but till something is done about expressing, I am afraid I can do nothing with you."

The rate obtained by the defendant's brothers, to which the plaintiff thus alludes, was forty-seven cents per one hundred pounds from their mills to Boston points.

This part of the letter which I have read may have some bearing on the construction of the contract afterwards made with the defendant.

By the same letter the plaintiff puts his offer in another shape, in which he is to pay a fixed price for the tow

delivered, the defendant paying the freight; a change which necessarily required that the point of delivery should be a part of the contract.

The letter proceeds thus: "I will, however, make you another offer. I will give you \$40 per ton for all you have, delivered at a Boston point, and you can put as much or as little as you choose into the cars—that would be your look out. This is my best and final offer to you. I will feel obliged to you if you will reply immediately either accepting or rejecting it. Why cannot you get the same rates as from St. Mary's and from Baden? Why don't you run down to Toronto, and settle the matter yourself?"

To this the defendant replied on 22nd December: "I am in receipt of yours of the 18th inst. to hand, and in reply would say I will deliver the tow at \$40 per ton; you can pay freight and deduct it from the same. Please send shipping instructions as soon as possible."

This made a complete contract for the tow delivered at a Boston point at \$40 a ton. All the evidence of subsequent correspondence or dealings leaves this contract, to my apprehension, untouched in its effect, however the defendant may have been willing to modify the performance of his part of it to suit the plaintiff's arrangements.

It appears from the plaintiff's evidence that he had, before these dates, sent similar goods from Chicago to the Town of Franklin, N.H., and knew that, by the New York Central Railway and its connections, Franklin was not a Boston point, he having been charged an additional rate of five cents per 100 lbs. to Franklin, over and above the through rate to Boston points.

He also shews that he had resold the tow to a company that had paper mills at several places, one of which was Franklin, and another of which was Bellows Falls, Vt., which latter place was a Boston point on the New York Central system of roads. He had made with J. & J. Livingstone a bargain similar to that made with this defendant William Livingstone, and had on 18th December, the date of his offer to this defendant, written to J. & J.

Livingstone to ship their tow to Bellows Falls. It happened, however, just then to suit his sub-vendees better to take delivery at Franklin and he accordingly telegraphed J. & J. Livingstone on 19th December to order all their paper stock to Franklin, N.H., saying he would pay arbitrary freight; and on the 26th he answered William Livingstone's request for shipping instructions by letter, saying:

"DEAR SIR,—Your favour of the 22nd accepting my offer of \$40 per ton for all your coarse tow is to hand. You will please ship it all as paper stock, to my name at Franklin, N. H., and send B. L., invoice, and draft to me here.

Commence shipping as soon as you possibly can; and try and give me some idea how much you will have. The freight to Franklin will be five cents per one hundred pounds higher than to Boston points, which of course we will pay."

This letter makes it perfectly manifest that the plaintiff had no idea that his offer, or the defendant's acceptance of it, involved any undertaking on the part of the defendant to pay the freight to Franklin.

There would be no pretense of support for the contention that the contract could be read otherwise, and so as to give the plaintiff an advantage that he did not suppose he was entitled to when he made his bargain, were it not that he discovered, after the contract was made, that Franklin was a Boston point on some railway with which the Grand Trunk Railway connected, and that through rates for freight might be obtained by way of the Grand Trunk from some of its stations to Boston points.

The defendant had in fact made his contract before he had effected a final arrangement as to the freight he was to pay.

This appears from his letter to the plaintiff, dated 5th January, 1880, advising of his first shipment of five cars, and saying: "Would have shipped before this, but could not get the rates low enough. The rates are to be 47 cts. per 100 pounds for 12,000 in a car. I will draw on

you for that much less deducted, which I hope you will see to all right."

The 47 cent rate was the same as that obtained by J. & J. Livingstone, of which the plaintiff was already aware. I do not think the reference to it in this letter can fairly be taken as an intimation which the plaintiff would understand as stating the fare to Franklin. So to hold we must ignore the plaintiff's own letter, stating that he was to pay part of the freight, that part being freight in excess of what the defendant was bound under his contract to pay. The plain import, and that which the plaintiff could not fail to understand, was, that whereas he was to pay \$40 a ton cash for the delivered tow, the defendant having to pay the freight to a Boston point, the defendant would for convenience sake draw only for the net balance, which would be his after paying his freight, leaving the plaintiff to pay the freight to the carrier. "The rates" referred to are obviously the same rates spoken of by the plaintiff in his letter of the 18th December, which he then suggested to the defendant the mode of arranging, and which in his mind then, and equally so on the 5th of January, or when he received the letter of that date, were rates to Boston points, of which Franklin, as he understood it, was not one.

Now, putting ourselves in the position of the parties as evidenced by the correspondence, bearing in mind the fact, which plainly appears from letters on both sides, that the bargain was regarded as so close a one as to make the rate of freight a matter of substantial importance: that the mode or medium by which the tow was forwarded was that actually in contemplation when the contract was made, and was in fact the "expressing" spoken of by the plaintiff in his letter of the 18th December; and further, that although it appears that by the Grand Trunk route a through rate to Franklin as a Boston point might have been obtained from a Grand Trunk station, we have no evidence that it could be obtained by that route from Milverton, or that, if obtainable, it would not have been higher



than by the route actually contemplated and actually adopted; it is impossible to hold that the defendant was chargeable with any departure from his agreement in sending by the route by which his tow went forward.

I shall have to make some remarks in the plaintiff's other case respecting his contention that, assuming Franklin not to have been a Boston point, the defendant ought to have made some arrangement by which the goods would have been sent to Franklin from some nearer point than Boston, and at a smaller additional or arbitrary rate than that of \$40 per car, which the plaintiff had to pay. These remarks will apply equally to this case.

In this case, as in the other, I am of opinion that the unexpected charges to which the plaintiff was put in consequence of making Franklin the place of delivery instead of some Boston point, cannot be recovered by him from the defendant, and that we should therefore dismiss the appeal, with costs.

FERGUSON, J.—The appeal in this case is from a judgment of the Divisional Court of the Queen's Bench Division, a majority of the Judges having held that the plaintiff was not entitled to recover.

The difficulty between the parties arose out of a contract for the sale and delivery by the defendant to the plaintiff of a quantity of tow for the purpose apparently of the manufacture of paper. The plaintiff at the time of the making of the contract resided in New York, and the defendant at Milverton, in Ontario. The contract is in writing, and, as will appear, is contained in certain letters that passed between the parties.

There had manifestly been some communications between the plaintiff and defendant on the subject, and on the 18th day of December, 1879, the plaintiff wrote the defendant as follows :

"Your telegram of the 16th is to hand this morning. After entering into a very careful calculation I find that it is quite impossible for me to pay your price and the



freight demanded. If you can obtain the same rates as your brothers have got, or can get ten tons into a car, I can afford to pay both your price and the rate of freight demanded, but not otherwise. I would like to buy your tow, but until something is done about expressing I am afraid I can do nothing with you.

I will however make you another offer: I will give you \$40 per ton for all you have, delivered at a Boston point, and you can put as much or as little as you choose into the cars: that would be your look out. This is my best and final offer to you; I will feel obliged to you if you will reply immediately either accepting or rejecting it. Why cannot you get the same rates as from St. Marys and from Baden? Why don't you run down to Toronto, and settle the matter yourself?"

On the 22nd day of December, 1879, the defendant answered as follows: "I am in receipt of yours of the 18th inst., to hand; and in reply would say, I will deliver the tow at \$40 per ton; you can pay freight and deduct it from the same. Please send shipping instructions as soon as possible and oblige." And,

On the 26th December, 1879, the plaintiff wrote to the defendant: "Your favour of the 22nd accepting my offer of \$40 per ton for all your coarse tow is to hand. You will please ship it all as paper stock to my name at Franklin, N. H., and send B. L., invoice, and draft to me here. Commence shipping as soon as you possibly can, and try and give me some idea of how much you will have. The freight to Franklin will be five cents per one hundred pounds higher than to a Boston point, which of course we will pay."

On the 5th day of January, 1880, the defendant wrote the plaintiff:

"Yours of the 3rd inst. to hand and noted. Will ship five cars to-morrow, and will have about four more at present to ship, which will follow as soon as possible.

"Would have shipped before this, but could not get rates low enough. The rates are to be forty-seven cents per one hundred pounds for twelve thousand in a car.

"I will draw on you for that much less deducted, which I hope you will see all right."

The tow was accordingly shipped by the defendant—five car loads on the 8th January, 1880, and four car loads

on the 17th of the same month. These shipments were to Franklin, as directed by the plaintiff. It appears that a "Boston point" means any point the rate of freight to which from the west is the same as to Boston, and that there are many of them.

The plaintiff had sold the tow to the Winnipisaukee Paper Company, who desired it to be delivered at Franklin, and this seems to be the reason for his directing the defendant to ship it to that point. He indorsed each of the bills of lading to this company. The tow went to Franklin by way of Boston, and it was found that the railway charges for freight from Boston to Franklin were much greater than the five cents per one hundred pounds, as stated by the plaintiff in his letter.

The railway company had made an erroneous charge for freight from Boston to Franklin, which occurred by charging for 20,000 lbs. in each car instead of the actual weight of the goods, but with this we have now no concern, as it was satisfactorily settled. The defendant drew upon the plaintiff for the price of the goods, less the forty-seven cents for freight, and the drafts were honored and paid by the plaintiff. It appears that Franklin is a Boston point upon one of the lines or systems of railway, but not upon the one by which the goods were shipped.

The plaintiff's claim is, to recover from the defendant the amount which he says he paid as freight upon the goods from Boston to Franklin. The action is framed upon the common *indebitatus* counts. The pleas are never indebted, payment and set-off. Upon these pleas the plaintiff joined issue. The counts upon which the plaintiff could recover if at all, would be the one for money paid by him for the defendant at his (the defendant's) request, and perhaps the one for money received by the defendant for his (plaintiff's) use.

It appears to me that the letters that are above set out, down to and inclusive of the one from the defendant to the plaintiff of the 22nd December, 1879, where he says, "Please send shipping instructions as soon as possible,"

constitute a complete contract for the sale of the goods delivered at a Boston point at \$40 per ton, and, after a perusal of the evidence and subsequent correspondence, and looking as carefully as I have been able at what is shewn to have been done by the parties, I am of the opinion that the contract remained throughout undisturbed in its effect; although the defendant did consent at the request of the plaintiff to ship the goods to Franklin instead of to a Boston point, both parties then thinking that Franklin was not a Boston point. This was done by the defendant for the convenience of and to suit the arrangements made by the plaintiff in the disposal by him of the goods. I cannot see that this, or what occurred or passed between the parties in regard to it, had the effect of disturbing the contract, or of making another contract.

The effect of the plaintiff's letter of the 26th December, 1879, so far as it relates to this subject, seems to me to be this: Our contract is complete. You will, however, ship the goods to Franklin, and send the bill of lading, invoice and draft to me here. Do this for my convenience. It will be quite the same to; you, for although there will be an additional freight, I will myself pay this.

I think the position of the parties and the terms of the contract indicate clearly enough that some shipping instructions were to be given by the plaintiff. He could have called upon the defendant to deliver the goods at any Boston point, and he was the one to say at which of these points delivery should take place. He was asked by the defendant for such instructions, and his response was: "Ship them to Franklin, and I will pay the additional freight." I can perceive no reasonable ground for contending that the defendant ever agreed to pay such or any additional freight.

It was contended that the defendant should have shipped the goods upon the other line or system of railway, and that if he had done so there could have been no question as to additional freight, as upon that line Franklin was a Boston point. It was not shewn, I think, that

this could have been done from the point at which, in the contemplation of both parties, they were to be shipped at a through freight, or, if so, at as low a rate as forty-seven cents, a rate of which the plaintiff was advised by letter of the 5th of January, four days before the first shipment. But, however this may have been or whatever might have been the effect one way or the other, the plaintiff being the one to give, and who did give, the shipping instructions, saying nothing as to any particular route by which the goods were to be sent, and saying, as he did, that Franklin was not a Boston point, and that he would pay the additional freight to that place, is in my opinion not at all in a position to complain because the other route was not chosen by the defendant.

It was also contended that there were Boston points nearer to Franklin than Boston, and for this reason the goods should not have been shipped by way of Boston, but by way of the Boston point nearest to Franklin. It was not shewn, however, that there was a Boston point from which to Franklin the freight was less than from Boston to Franklin. Even if this had been shewn, I think it might then be fairly said to the plaintiff that he was so at fault in not mentioning the fact in giving the shipping instructions that the defendant was thereby relieved from the responsibility in this respect that is now sought to be cast upon him.

Barr, an agent of the Merchants' Despatch Transportation Company at Toronto, is asked, what would be the proper Boston point to ship to, if the goods were consigned to Franklin, and he says: "We would take them to Boston." He says he has been connected with railroading in Canada for twenty-six years, and in the business in which he now is six or seven years.

The plaintiff having directed the defendant to ship the goods to Franklin, saying that he would pay the additional freight, and not having mentioned any particular route by which they were to go, or any particular point through which they were to pass, I am of the opinion that the



defendant has not been shewn to have been at fault in respect of the manner in which the goods were shipped; and I utterly fail to see that there is any sufficient ground for saying that the defendant was ever legally liable for the payment of the additional freight that is the matter in contention.

I do not perceive how the money paid by the plaintiff—if it was paid—and now claimed by him from the defendant, was money paid by the plaintiff for the defendant at his (the defendant's) request.

The actual request of the defendant was to pay the 47 cents freight. This was done, and there is now no contention about it.

There may also be an implied request, as where one is compellable to pay and does pay money which another ought to pay, and is legally liable to pay. Now even assuming that the plaintiff was compellable to pay this money—and this is assuming too much in the plaintiff's favour, but I do not think it necessary to discuss the subject—I think there could be no implied request from the defendant, because he (the defendant) was not legally liable for the payment of it. I do not think he was even benefited by the payment of it. I am of the opinion that the plaintiff cannot recover as for money paid, &c., and I do not think that any part of the money paid to the defendant was received by him for the use of the plaintiff.

It was also contended that the defendant's letter of the 18th of March, 1880, is an acknowledgment of liability by him, but as pointed out by my Brother Burton upon the argument, it had reference to a matter that was afterwards settled. Even if this were not so the letter would be only a promise to have the matter satisfactorily settled, which would mean settled rightly according to the contract.

I think the defendant simply performed his contract, and was paid the amount of money that ought to have been paid to him.

I think the judgment of the Court below is right, and that the appeal should be dismissed, with costs.



ROSE, J.—The contract in this case is contained in certain letters which passed between the plaintiff at New York, and the defendant at Milverton, a station on the Port Dover and Lake Huron railway between Stratford and Listowel.

The correspondence, so far as appears on the appeal book, begins with a letter dated 18th December, 1879, from plaintiff to defendant.

“DEAR SIR,—Your telegram of the 16th is to hand this morning. After entering into a very careful calculation, I find that it is quite impossible for me to pay your price and the freight demanded.

“If you can obtain the same rates as your brothers have got, or can get ten tons into a car, I can afford to pay both your price and the rate of freight demanded, but not otherwise.

“I would like to buy your tow, but till something is done about expressing, I am afraid I can do nothing with you.

“I will, however, make you another offer.

“I will pay you \$40 per ton for all you have, delivered *at a Boston point*, and you can put as much or little as you choose into the cars, that would be your lookout. This is my best and final offer to you. I will feel obliged to you if you will reply immediately, either accepting or rejecting it.

“Why cannot you get the same rates as from St. Mary’s and from Baden?

“Why don’t you run down to Toronto and settle the matter yourself.”

To this defendant replied on the 22nd, stating :

“I will deliver the tow at \$40 per ton. You can pay freight, and deduct it from the same. Please send shipping instructions, and oblige.”

Thus the contract was to deliver the tow at any Boston point at \$40 per ton, defendant to pay freight. As a matter of convenience, plaintiff was to pay it out of the purchase money, and remit balance.

“Boston point” means any point to which the freight would be the same as to Boston. This of course would

include Boston, as was testified. The rates referred to as the same "as your brothers have got" were forty-seven cents per ton to a Boston point.

It remained, therefore, for the plaintiff to name a Boston point, and give such shipping instructions as would enable defendant to ship the goods to such point.

On the 26th December plaintiff writes directing shipment "to my name at Franklin, N. H.," adding: "The freight to Franklin will be five cents per one hundred pounds higher than to Boston points, which of course we will pay."

It is manifestly clear that the plaintiff was giving instructions to ship to a point which he stated was not a Boston point, and therefore to which defendant was not bound to ship. It is also clear that he requested defendant to ship to Franklin *via* a Boston point, leaving the defendant to pay the freight to such point, and undertaking to pay the freight from such Boston point to Franklin. It is also clear that he left defendant without instructions as to the Boston point to which he should ship, and therefore that the defendant was at liberty to ship to any Boston point *en route* to Franklin, using reasonable care in so doing.

It is contended on the part of the plaintiff that this letter must be read as a direction to defendant to ship to Franklin and to pay all the freight to that place, less five cents per one hundred pounds, leaving the risk on the defendant as to whether the rate to Franklin from the ordinary Boston point would be greater than five cents. This I cannot accede to. The plaintiff had made a contract, he was bound to accept the tow at a Boston point, he had no right to ask the defendant to ship to any but a Boston point, he had therefore no right to ask defendant to assume any risk. I think any reasonable business man reading such letter, after having made such a contract, would have felt that he was discharging his duty by forwarding the goods to Franklin by the ordinary route through the usual Boston point on such route, paying the freight to such Boston point and leaving the plaintiff to pay the freight from such point, whether the same happened to be less or

more than the five cents. And this the more reasonably so when the knowledge as to the rate to Franklin from the Boston point could be obtained and was obtained by the plaintiff. It could not it seems to me have occurred to the defendant that the plaintiff's letter asked him to do what he was not bound to do, and run the risk of the information of the plaintiff as to the rate being correct.

If the plaintiff's letter had run thus: "I have entered into a contract with you to accept all your tow at a Boston point, you paying the freight. I have made up my mind not to have the goods sent to a Boston point. I wish you to send them to another point. The freight will be higher, to the amount of five cents. I will pay the five cents and "you must pay any excess"—would not the defendant be considered justified in regarding such a letter as a most perfect exhibition of assurance? If so, is the argument that the effect of the letter is something that no man in his sound senses would agree to, entitled to more patient consideration?

It seems to me the conclusion is more evident when we look at the facts and circumstances surrounding the parties.

The plaintiff, as I have stated, lived in New York. The defendant at Milverton on the Port Dover and Lake Huron Railway, between Stratford and Listowel.

It was admitted at the trial that Milverton and Millbank were adjoining stations on such railway between Stratford and Listowel, and that there was no other railway at these points; further, that the goods were shipped at Milverton and Millbank.

It further appeared that the system of railways connecting Listowel with Boston was made up of the Canada Southern and New York Central. That goods given to the railway at Listowel for shipment to Franklin would be sent in ordinary course to Boston, and thence by rail to Franklin.

It was further stated that Franklin was a Boston point on the line of the Grand Trunk Railway *via* St. Albans, but it was also stated that it was not a Boston point by

the other route; that, in fact, it was not a Boston point on any route from the Niagara frontier.

The plaintiff had been in Canada prior to making this contract. He had at such time made a contract with the defendant's brothers. He seemed perfectly acquainted with the routes and mode of transportation. In his first letter above set out, he asks, "Why cannot you get the same rates as from St. Mary's and from Baden?" places not very far distant from Listowel and Stratford. "Why don't you run down to Toronto, and settle the matter yourself?" As the defendant did subsequently go to Toronto, and arrange rates with Barr, the agent of the Merchants' Transportation Company, who carried the goods, it is not unfair to assume that such an arrangement is what was referred to in the letter.

This being so, either the plaintiff knew that Franklin was a Boston point, or he did not. If he did know the fact, that fact was that it was a Boston point only *viâ*. St. Albans. Therefore, when he stated in his letter it was not a Boston Point he must have understood the tow was not to go *viâ* St. Albans. If he did not know it was a Boston point by any route, then, when he stated to defendant that it was not a Boston point, he could not complain if defendant finding it was not a Boston point by the usual route from Milverton or Milbank, sent the tow by the ordinary and usual route to Boston, the usual and ordinary Boston point for transshipment or forwarding to Franklin.

But it is said that the position was in some manner changed by defendant's letter to plaintiff dated January 5, 1884.

It is as follows:

"Yours of the 3rd inst. to hand and noted. Will ship five cars to-morrow, and will have about four more at present to ship which will follow as soon as possible. Would have shipped before this, but could not get the rates low enough. The rates are to be forty-seven cents per one hundred pounds for twelve thousand in a car. I will draw on you for that much less deducted, which I hope you will see to all right, and oblige yours."



The letter of 3rd is not in evidence. It is argued that this letter is evidence of a representation that the through rate to Franklin would be forty-seven cents. I do not see how it can be so construed.

He had received the letter of 26th December, telling him that Franklin was not a Boston point, and that the freight would be five cents higher than to a Boston point.

It was stated by Mr. Robinson, and not contradicted on the part of the defendant, and is, I think, the fair inference from the evidence, that before the receipt by defendant of the letter of 26th December, he had arranged with Barr for carriage to a Boston point at forty-seven cents per 100 pounds, and that upon receipt of that letter he gave instructions to ship to Franklin. If this is so, the letters and conduct agree, and we can well understand that defendant shipped the goods to Franklin, quite understanding that he was to pay forty-seven cents of the freight, which sum he deducts from the draft on plaintiff, and that the plaintiff was to pay the balance. It was immaterial to the defendant what that balance was. He, of course, understood from plaintiff's letter that it was five cents, but that was plaintiff's concern, not his.

Plaintiff made a mistake. The rate was not five cents per hundred pounds, equal to six dollars per car of 12,000 pounds, but forty dollars per car. Having made this mistake, he wishes to compel defendant to bear the loss. I am glad to be able to come to the conclusion that he fails.

It was contended that defendant should have found a nearer Boston point than Boston. Admitting for the moment that he should, although as I have pointed out I think it was not his duty, it is not shewn that any better rate could have been made from any other Boston point to Franklin. The evidence in the case shews what every body knows, that distance is no measure of rates, and although the evidence shews that there were Boston points nearer Franklin than Boston, there is no evidence that the rate was less from such points than from Boston. Plaintiff does not shew that from any point the rate would have been



five cents per one hundred, and it is more than probable that as to this he was entirely misled, as he also was with reference to Franklin being a Boston point.

This as I apprehend disposes of the appeal without the necessity of considering the other questions discussed.

The evidence as to promise to pay, Mr. Bethune admitted, was not sufficient to create liability if none pre-existed. I am not satisfied that it was evidence upon which reliance could, in any event, be had. As pointed out by my Brother Burton on the argument, it was, as given in evidence by the plaintiff, an admission of the correctness of the whole account, which included an item now manifestly incorrect, *i. e.*, the overcharge by the railway of about 8,000 pounds on each car, and which, since the commencement of the suit, has been refunded by the railway.

I should have had difficulty in satisfying my mind that there was evidence of the payment by the plaintiff of the amount claimed or any portion of it had I not taken the view I have, and it had thus become necessary to consider the question. This might not, however, have disposed of the case, as probably a reference could have been directed on that point.

I am of the opinion that the appeal must be dismissed, with costs.



In the case of *Symmers v. John and James Livingstone*, on the appeal by the defendants from the Common Pleas Division, the following opinions were delivered by the Judges on allowing the appeal:—

October 30th, 1884. PATTERSON, J. A.—The appeal in this case is from a judgment of a Divisional Court of the Common Pleas Division, consisting of the present Chief Justice of the Queen's Bench, Mr. Justice Galt, and my Brother Osler who was then a Judge of that Division.

It was held by a majority of the Court that the plaintiff was entitled to recover from the defendants money paid by him, or by vendees of his to whom he was accountable, for

freight from Boston to Franklin in New Hampshire, upon goods sold by the defendants to the plaintiff.

The case turns as much on questions of fact as on any question of law. A very material fact is the precise nature of the contract between the parties; and as that depends a good deal, if not entirely,<sup>e</sup> on documentary evidence, the effect of which seems to have been in some points apprehended differently by the learned Judges who gave judgment in this case, I shall endeavor to state my own understanding of it.

The negotiations began in December, 1879, the first writing being a letter from the plaintiff to the defendant inviting an offer from them for the sale of tow. Its date is 8th December, 1879. The following day the defendants telegraphed an offer of fifty tons or more for forty dollars a ton, delivered at "Boston points," and the plaintiff by telegram accepted that offer.

The term "Boston points" denotes places to which the railway charge for freight is the same as to Boston, and it includes Boston itself, as witnesses tell us, although it would seem a matter of course.

At this point, viz.: on 9th December, 1879, I apprehend the contract was complete. Its terms were as simple as possible, being the sale of 50 tons of tow at \$40 a ton, delivered at any Boston point the plaintiff might name.

One matter to which I call attention as important is that not a word is, so far, said about freight. Of course the defendants were to pay it; and we understand from evidence, that the rate to any Boston point was forty-seven cents per hundred pounds, but it is not alluded to in the documents up to this date.

The contract being thus complete, we find the defendants on 12th December, writing to the plaintiff to send them shipping instructions. On the 16th he promises to give them directions where to ship to as soon as they let him know when they will be able to ship, and on the 18th he telegraphs and also writes to them to ship to Bellows Falls, in Vermont, which place is proved to have been a

Boston point, but on the following day he varies that direction by a telegram from Boston: "Order all paper stock to Franklin, N. H. I will pay arbitrary freight."

The plaintiff in his evidence explains that an arbitrary rate is the extra freight charged for carriage from a station to which there is a through rate to one which has no through rate. He shews also that he referred to it in this despatch under the idea that Franklin was not a Boston point, he having once had to pay an arbitrary rate of five cents per hundred pounds, on goods sent from Chicago to Franklin by the Blue line, which runs over the New York Central Railway. The fact is proved and may here be mentioned, that Franklin was a Boston Point in the railway system with which the Grand Trunk railway had connections, but was not a Boston point in the system of railways running from the Niagara frontier, over which goods were sent by the Great Western or Canada Southern Railways.

On 20th December the plaintiff repeated by letter his instructions to send the goods to Franklin instead of Bellows Falls, repeating also that he would pay the arbitrary rate to that place, which arbitrary rate he said was five cents per one hundred pounds over Boston rates.

Some delay was just at that time caused by questions respecting the admission of the tow into the United States free of duty as raw material for the manufacture of paper. Alluding to this, the plaintiff in a letter of 22nd December, urged the defendants to bear in mind that when that matter was settled he wanted all the paper stock to go to Franklin, N. H., instead of Bellows' Falls, Vermont, adding: "I have explained to you about the difference of five cents per one hundred pounds in freights to Franklin, so I suppose you are satisfied on that score." It was urged for the plaintiff that this passage indicated an understanding that *the defendants* were to pay the arbitrary freight, and that that was the score on which their satisfaction was assumed. The opposite inference seems to me very obvious.

As I have shewn, the contract was simply to deliver at

a Boston point, or, in other words, at a point to which there was a through rate the same as to Boston; and what the defendants had to be satisfied about was that in sending to a place which was not a Boston point they incurred no obligation greater than their contract bound them to, because any additional freight was to be paid by the plaintiff. The object of this letter of 22nd December is to press the change of destination and induce the defendants to consent to it, though something different from what they had before agreed to; therefore their attention is called to the explanation that the extra freight is not to fall on them.

This is, I believe, the whole evidence touching the formation or modification of the contract, and I do not apprehend that it leaves anything in doubt. I observe that the plaintiff in his evidence treats the position as established that the defendants were to deliver at Franklin, paying all extra freight incurred by its not being a Boston point, beyond the five cents per one hundred pounds, which he concedes he was to pay. I do not perceive the slightest warrant for so reading the bargain. If Franklin was a Boston point within the meaning of the contract then the defendants should have sent the goods there direct. There would have been no arbitrary freight to pay. But if it were not a Boston point, which is the hypothesis on which the correspondence concerning the arbitrary rate proceeds, the defendants were not bound to deliver there at all, and never undertook to send the goods there at any increased expense to themselves, and never were asked to do so. The references to the supposed rate of five cents give the plaintiff's understanding of what the increase would be, but in no way point to liability on the defendants' part if it turned out that the rate had been underestimated.

The first shipment was on 10th January, 1880. It consisted of four car loads consigned to the order of J. & J. Livingstone, at Franklin station, N. H., from Listowel station, by the Port Dover and Lake Huron Railway, which



is the only railway passing Listowel; and was sent by the Merchants' Despatch Company.

The defendants had arranged with the agent of that company for a rate of forty-seven cents per one hundred pounds to Boston points.

The company sent the goods over the New York Central Railway from the Suspension Bridge, and then by the Boston and Albany Railway. On that route, as I have mentioned, Franklin was not a Boston point, and consequently an arbitrary rate was charged from Boston, *via* which city the goods went, to Franklin.

One ground now taken by the plaintiff is, that the defendants ought to have sent by the Grand Trunk route, on which Franklin was a Boston point, no particular route having been specified in the contract or by the plaintiff. I have shewn how the plaintiff, in changing his first instructions for shipment, did so on his understanding that Franklin was not a Boston point, evidently thinking of the New York Central as the road which would carry the goods, and having then no idea that the contract required the defendants to send by any other route, or in fact, to send to Franklin at all. He now says that he was not at the time aware that Franklin was a Boston point on any route by which through rates could have been got; and having since ascertained that it was, his case is that the defendants ought to have had that knowledge, and ought to have sent by the other route.

This contention cannot in my judgment be acceded to without overlooking several considerations which cannot be lost sight of. In the first place it is not shewn that a through rate upon the Port Dover and Lake Huron Railway, *via* the Grand Trunk and its connections, could have been got to Franklin as a Boston point. The fact that goods were carried from the Grand Trunk station at Sarnia to Franklin for forty-seven cents, proves nothing on this point.

Then reverting to the written contract we have, in the term "Boston point," something to which we cannot



attach any meaning without evidence. It has been explained by a definition so general as to require further evidence before we can say that any particular station came under it. If we test the meaning of the parties by supposing them to have written in full the names of the places in their contemplation at the time, we know from the plaintiff's own testimony as to his former experience that he would not have included Franklin.

It is quite plain that the route he had in his mind when he made the contract was the New York Central route, and that the Boston points in his contemplation were those upon that route. This is entirely borne out by his correspondence touching the change of destination, and there are other important facts.

The consignment of 10th January seems not to have reached Franklin till the end of that month. It had been followed, on 17th January, by two car loads sent from Sarnia or St. Mary's by the Grand Trunk railway, and these had been detained after crossing the frontier at St. Albans by the American customs authorities, who demanded duty on the tow.

A third consignment of ten car loads had gone forward from Listowel by the Merchants' Despatch, on 21st January, by the same route as the first.

All three were still on the way on 28th January, when the plaintiff wrote the letter of that date which is in evidence, in which he speaks of the two cars being held for duty at St. Albans, and adds: "If in time, please order those last ten cars shipped, to be sent *via* Suspension Bridge, if not sent that way already, as the trouble seems to be at the St. Albans Custom House."

In the face of all these facts, if I have not much misapprehended the evidence before us, I am unable to appreciate the charge of violation by the defendants of their contract by the forwarding of the fourteen cars by the route by which they were sent. No doubt the plaintiff has found that he was seriously in error in his estimate of the arbitrary rate he would have to pay; but I think

he entirely fails to shew that anything either in the contract or the conduct of the defendants makes it right to throw the loss upon them.

If the goods had gone forward by the Grand Trunk route, it would, as it now appears, have been to the plaintiff's advantage—leaving out of sight the custom-house difficulty—but it would have been an advantage which he did not contemplate when he made the contract. That, of course, is no reason why he should not have enjoyed whatever benefit happened to come in his way; but it takes the force out of any complaint of his finding himself in a worse position than he ought to have been in under the contract as he understood it himself.

Upon these grounds, and without noticing others discussed before us, I think the defendants are entitled to succeed.

I have not overlooked the contention that something might have been saved if the goods, instead of being sent to Boston and thence ninety-four miles back to Franklin, had been transferred from some Boston point nearer to Franklin. The defendants appear to have shipped in the usual way, and in a way that complied with the plaintiff's directions to ship to Franklin, by consigning the goods to that place through the medium of the Merchants' Despatch Transportation Co. I believe we have direct evidence of the plaintiff's approval of that method of transportation in a letter written on 18th December, 1879, to William Livingstone, the brother of the defendants, who was negotiating for the sale of tow which he had on the line of the Port Dover Railway, in which letter the plaintiff alludes to the rates obtained by the defendants, and says to William: "Why don't you run down to Toronto, and settle the matter yourself?" meaning, if I understand it correctly, why do you not go to the chief officer of the Merchants' Despatch Co.

There is, however, no certain evidence that anything could have been saved, nor that the suggested course would have been practicable, nor is there anything shewn to

throw on the defendants the duty of doing more than they did ; while on the other hand there is affirmative evidence that the route by Boston is the ordinary and usual one.

I am of opinion that we should allow the appeal with costs, and dismiss the action, with costs.

BURTON, J. A., concurred.

FERGUSON, J.—This is an appeal from the Divisional Court of the Common Pleas Division, a majority of the learned Judges having held that the plaintiff was entitled to recover

The case is in many if not most of the material parts like the case of *Symmers v. William Livingstone*, in which I have just given a judgment ; and after having examined the case as well as I have been able, and had an opportunity of reading the judgment prepared by my Brother Patterson, I entirely concur in his conclusion, and the reasons that he has given for it. The appeal ought to be allowed, with costs ; and the judgment in the Court below should be for the defendants, with costs.

ROSE, J.—I entirely concur in the opinion of my learned Brother Patterson and the reasons given therefor.

Further consideration and consultation have strengthened the views formed at the hearing.

The contract as stated in such opinion seems to me to leave no room for doubt as to the liability of the parties and the conduct of the plaintiff is in my view entirely inconsistent with his present contention.

I agree that the appeal must be allowed, with costs.

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## MCLEAN V. GARLAND.

*Assignment for benefit of creditors—Accidental omission of claim from schedule of debts—Want of mala fides—Acts not prohibited by statute—R. S. O. ch. 118.*

For the expressed purpose of making a fair and equitable distribution of his property and effects amongst all his creditors, a trader in insolvent circumstances executed a deed of assignment of all his property real and personal in trust to sell the same, and out of the proceeds (1) to pay in full the several debts due or to become due by the assignor to the assignee, and the several other persons and firms designated in a schedule annexed thereto, and if insufficient for that purpose, to distribute the proceeds ratably amongst the several persons and firms named in the said schedule; and secondly to return any surplus to the assignor. A claim for \$26.86, which the Court below held to be established, was in ignorance or by inadvertence omitted from such schedule, and the defendant, a scheduled creditor, obtained judgment for \$1,780.75; and under his execution the sheriff seized the goods. The Common Pleas Division held the deed to be invalid in consequence of the omission of such claim for \$26.86.

On appeal, this Court being equally divided, the appeal was dismissed, with costs.

HAGARTY, C. J. O., and BURTON, J. A., affirming the judgment of the Common Pleas Division 32 C. P. 524.

PATTERSON, J. A., and CAMERON, C. J., *held*, that the alleged debt of \$26.86 upon the evidence set out below was not proved; and that even if proved, its omission from the schedule did not, under the circumstances, shew the intent necessary to invalidate the deed under R. S. O. ch. 118, sec. 2.

*Per* HAGARTY, C. J. O., there having been apparently no discussion at the trial, or in the Divisional Court as to the sufficiency of the evidence on which the alleged debt was held to be proved, the existence of such debt should not be treated as open to question in this Court.

*Per* HAGARTY, C. J. O., and BURTON, J. A., dissenting from the opinion of WILSON, C. J., in *Thorne v. Torrance*, 18 C. P. at p. 35, the creditor omitted could not now be admitted to the schedule. *Contra, per* PATTERSON, J. A., and CAMERON, C. J.

Remarks *per* CAMERON, C. J., as to the circumstances under which a provision for the payment of rent and taxes as a first charge would or would not be an objection.

Remarks *per* BURTON, J. A., and CAMERON, C. J., as to the object and effect of the proviso to R. S. O., ch. 118, sec. 2.

*Quere, per* CAMERON, C. J., whether the omitted creditor not having obtained judgment and execution, the defendant could take advantage of such claim to defeat the plaintiff's right (a).

THIS was an appeal by the claimant Daniel McLean from a judgment pronounced by the Common Pleas Division, on the 29th of December, 1882, in the matter of an interpleader issue to try the validity of a deed of assignment

(a) The case has been carried to the Supreme Court.



under which he claimed certain goods, &c., as against the respondent, a judgment creditor of one A. W. E. Thompson. See 32 C. P. 524, where the material parts of the deed of assignment are set out at length.

Isaac H. McLean was examined previous to the trial, and his depositions which were read thereat, were as follows :

“I am the son of the plaintiff. I remember being called upon to obtain an assignment from A. W. E. Thompson to plaintiff. Thompson came down from Gore Bay, Manatoulin Island, and presented a statement of his affairs to his creditors in Toronto. I was not present. I know the plaintiff was present at the meeting. I was instructed by the plaintiff to proceed to Gore Bay and take a statement of Thompson's affairs, liabilities and assets, which I did ; he had previously, when he was present at the meeting at Toronto, presented a statement. When I went to Gore Bay I had with me a memorandum of the total results of his liabilities and assets. I left Toronto on May 23rd, it was immediately after I received my instructions ; I landed in Gore Bay on the night of the 25th of May—it was midnight. The following day I took a statement of his affairs and made out from his books, with his assistance, a full and complete list of his creditors, so far as he told me and so far as the books shewed. I had this assignment with me at the time. Schedules “A” and “B” [statements of assets and liabilities] were annexed at that time ; they are all in my handwriting—I made them on the 26th. It also included a pencil statement headed “small sums.” This deed was executed on that day by Mr. Thompson, and the signature as witness to the execution of it is mine. We were engaged all day Friday and until Saturday noon, taking stock and examining the accounts. I went through every book he had in his place—he had a day-book, sales-book, and a journal ; he represented that they were all the books he had, and contained all his business. He went over the schedules “A” and “B” with me. I had no reason to suppose that any creditors were omitted or accounts—he said there were none omitted. When the deed was executed I immediately took charge of the stock handed over to me, and the premises, which were handed to me by Thompson, by his handing me the key. I took possession of the goods. I remained in possession during Saturday afternoon, and appointed a man named Mr. Hawkey to take charge for Mr. McLean, at the rate of \$1.00 a day. I don't know personally how long he stayed there. The assignment was executed in the ware-room of Thompson. \* \*

The schedules were attached to the deed at the time it was executed. Mr. Hawkey was a clerk in Mr. Thompson's employment. I left both Thompson and Hawkey in possession of the store under wages from the plaintiff ; and Thompson was responsible to Hawkey for what moneys he collected. Hawkey had been Thompson's salesman up to that time. I took no other steps than those I have told of to take possession of the place. \* \*



Garland was one of the creditors named in the schedule and had sued the debtor and obtained judgment and execution for the amount of his claim \$1,780.75, under which the goods of Thompson were seized.

The other facts appear in the report of the case in the Court below.

The appeal came on to be argued before this Court on the 10th of September, 1884.\*

*Osler*, Q. C., for the appellant. The question raised by this appeal is simply whether a person or a class of persons is excluded by the terms of a deed of assignment, which it is submitted is a question of intention to be gathered from the whole deed; *Mills v. Kerr*, 32 C. P. 71, affirmed in appeal 7 A. R. 769. In the present case a schedule was attached to the deed, and the evidence shews that this schedule was carefully prepared by the debtor and by the agent of the appellant, their desire and intention being to include all the creditors of Thompson. If as a matter of fact the schedule did contain all his creditors, no objection would lie to the deed: *Mills v. Kerr*, supra. The deed of assignment was entered into between Thompson and the appellant; the creditors not being made parties to it. The recital in the deed clearly demonstrated that the intention of the parties was to assign all the property of the debtor to the appellant for the purpose of a fair and equitable distribution of the estate amongst all the creditors; and the appellant accepted the trust with this understanding, and advertised for all creditors to send in their claims, and no claim other than those scheduled was sent in. Both the debtor and the assignee are bound by the recital in the deed to distribute the estate amongst the creditors of Thompson, and if necessary the deed can be reformed by amending the schedule and adding the name of Alexander Sinclair, who claims to be a creditor of Thompson to the extent of \$26.86: *Stroughill v. Buck*, 14

\* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, JJ. A., and CAMERON, C. J. C. P.

Q. B. 781 ; *Carpenter v. Buller*, 8 M. & W. 209 ; *Knight v. Gravesend*, 2 H. & N. 6 ; *Chitty on Contracts*, 10th ed., pp. 83, 84, 87. As to amending the schedule, see also *Gillespie v. Grover*, 3 Grant 558.

The evidence shews that the respondent himself proposed that Thompson should execute a deed of assignment, and his name appears upon the schedule of creditors. Under such circumstances the respondent cannot be heard to say that some other creditor's name is omitted from the schedule, and that the deed is thereby vitiated. Sinclair's name it is shewn was omitted by mistake. It is questionable, however, whether he is a creditor at all ; but he is not excluded by the deed, and he may come in now and prove his claim : *Gunn v. Adams*, 4 Chy. Ch. 115. Admitting for the moment that Sinclair was really entitled to rank as a creditor on the estate, the claim amounts to only \$26.86, while the deed of assignment comprises assets amounting to several thousand dollars (\$7,132 in all). Even if the claim is a valid one, it is so trifling in amount that it ought not to be allowed to vitiate a fair and equitable arrangement for the benefit of creditors.

In *Westbrooke v. Browett*, 17 Gr. 339, the Court refused to entertain a suit for £10 without reference to the merits of the claim. *A fortiori* will the Court refuse to invalidate a deed which it is shewn is for the benefit of all the known or ascertained creditors of the estate, and by so doing let in one creditor to be paid in full to the detriment of the general body of creditors. Here it is clear from the evidence of Isaac H. McLean that at the time of making the assignment no such debt appeared upon Thompson's books, and that Thompson asserted that no creditors existed other than those named in the schedule.

*A. C. Galt*, also for the appellant. The alleged debt from Thompson to Sinclair was not proved. The letter produced by Sinclair, and said to have been written by Thompson, requested Sinclair to send him a list of goods, and then goes on to say : " You might send me an assorted

order of milk pans, four dozen each, and four dozen high crock cream crocks." Sinclair says that in reply to this he sent all the goods enumerated in Exhibit No. 4 (a). There is no evidence that the goods were delivered to any carrier, but only to a warehouseman; and there is no evidence that Thompson ever received them. The goods alleged to have been sent were greatly in excess of those alleged to have been ordered, and of course Thompson was not bound to accept more than he had ordered. The order, if any, was a specific one, and it was not complied with. A purchaser is not bound to select goods which he has specifically ordered out of an assortment of other goods which he has not ordered: *Levy v. Green*, 28 L. J., Q. B., 319; *Cunliffe v. Harrison*, 6 Ex. 903; *Cross v. Elgin*, 2 B. & Ad. 106.

*W. F. Walker* and *Monck* for the respondent. The authorities referred to by the Divisional Court in giving judgment establish that the conclusion arrived at by the Court was a correct one. The deed of assignment in question expressly states that the assignment was made for the payment of those creditors only who were mentioned in the schedule, after payment of rents, taxes, assessments, &c., which were made a first charge on all the assets assigned. As a matter of fact certain creditors, namely, Alexander Sinclair and J. & J. Taylor, were excluded altogether from any benefit under the deed, and therefore the deed was void: *Tetley v. Wanless*, L. R. 2 Ex. 21; *Drever v. Mawdesly*, 16 Sim. 511. Admitting for the sake of argument that the deed could be reformed as between the assignor and assignee it could not be reformed so as to affect the rights of other parties who were not parties to it. After the rights of execution creditors had intervened, the deed could not be

(a) Exhibit 4 printed in the appeal book at p. 23 was headed, "PRICE LIST OF GOODS, Derby Pottery, Kilsyth, P. O., Gore Bay, Sept 24, 1881," and was an invoice of thirty-four different lots of goods alleged to have been forwarded by Sinclair to Thompson, including bottles of different sizes, preserve jars, flower pots of different sizes, &c., and shewing a balance due Sinclair, after deducting a discount of  $\frac{1}{3}$ , of \$26.86.

reformed so as to prejudice those rights, and after any creditor became a party by filing his claim with the assignee, or in any other way intimating his willingness to accept the provisions of the deed, the deed could not be reformed, and he would have a right to have the assets distributed among those creditors only who are mentioned in the schedule.

The learned Judge at the trial found against the appellant's evidence as to any acquiescence on the part of the respondent in this deed, and in favor of the respondent's evidence. The appellant's evidence shews no acquiescence. It shews the deed never was submitted to the respondent, and that he did not know its provisions. The learned Judge was right in finding at the trial that Alexander Sinclair was a creditor of Thompson, and was omitted from the schedule to the deed. He ought also to have found on the evidence that at the date of the assignment J. & J. Taylor were creditors, and were also omitted. At that time there was a personal liability on Thompson to pay J. & J. Taylor's claim, and they ought to have been provided for in the deed. R. S. O. ch. 118, renders such a deed void unless it is for the benefit of all creditors. It does not permit the assignor to omit one, however small his claim may be. It rested on the appellant to prove that all creditors were included in the scheme, but this he failed to establish: *Watts v. Howell*, 21 U. C. R. 257. The deed on the face of it prefers certain other classes of creditors. It provides for the payment in full first of "all rents, taxes, and assessments," due or to become due on the lands until they are paid, and these are payable out of assets, for instance, book debts, against which they could form no lien; *Watts v. Howell*, 21 U. C. R. at 269; *Andrew v. Stewart*, 6 A. R. 495; *Hendry v. Harty*, 9 C. P. 520.

The deed is void in not complying with the provisions of R. S. O. ch. 119, sec. 5, in this, that there is no evidence of the filing of the deed, and no evidence of an immediate delivery of the goods followed by an actual and continued change of possession. There was no evidence of change of



possession that could be apparent to others than the parties concerned: *McLeod v. Hamilton*, 15 U. C. R. 111; *Wilson v. Kerr*, 17 U. C. R. 168; *Heward v. Mitchell*, 10 U. C. R. 535.

No time being fixed by the assignment within which the estate was to be wound-up renders the deed void as against execution creditors. That is left entirely in the discretion of the trustee. And the sale of the land being evidently postponed to the collection of the debts also renders the deed void: *Cornwall v. Gault*, 23 U. C. R. 46. The recitals in the deed cannot control or enlarge the operative words in it unless the latter are ambiguous: *Ingleby v. Swift*, 10 Bing. 84; *North Western R. W. Co. v. Whinray*, 10 Ex. 77; *Buvelot v. Miles*, L. R. 1 Q. B. 105; and other cases referred to in the judgment of the Court below.

November 20, 1884. HAGARTY, C. J. O.—If the case depended on the existence or non-existence of a debt due to Sinclair, my opinion would be against the appellant. There is evidence from which a debt might be inferred, according to the way in which that evidence is read. In one view it would seem that in the February following the shipment of the goods, and before the assignment, the debtor had acknowledged the receipt of them.

This statement may possibly have referred to some earlier dealing between the parties. This could have been readily ascertained by a question at *Nisi Prius*. The Judge who tried the case without a jury found there was a debt. There was also some evidence as to the forwarding the goods for shipment in the ordinary way to the execution debtor's address.

I cannot find in the notes of the evidence that there was any discussion before the learned Judge as to the sufficiency or insufficiency in proof of Sinclair's debt. Evidence of the admission of receipt of the goods made by the debtor after the assignment was rejected.



The learned Judge finds that Sinclair was a creditor to the amount of \$26.86. He notices the written order, the previous sale of goods and shipment by steamers, and that he had sent these goods in the same way; that the boat had not been lost, and that he considered the goods at the purchaser's risk when delivered to the carriers.

The motion in the Divisional Court was simply on the law and evidence, and the weight of evidence, and that the deed of assignment was good and that the execution defendant sanctioned and approved of it, and ought not now to be allowed to dispute it.

In the written judgment of the Divisional Court no notice whatever is taken of the question of Sinclair's debt, but the judgment is based on the apparent assumption that such debt existed.

We cannot find any trace of the Court's attention having been called to that question. If the Court had inadvertently passed it over, its attention could readily have been called to it up to the last moment of the delivery of the judgment.

If it was seriously intended to dispute the existence of the debt, the prominent, if not the only real objection to the deed, the assignee should have specially brought such question before the Court by affidavit or further evidence. They could of course have objected to the learned Judge's ruling; if he did rule specially on the sufficiency of the proof, they could have asked for a new trial on that ground.

No one reading the motion would have supposed that it was designed to raise objections to the finding of the Judge on this question, as if he held the Sinclair debt proved, and arrived at that conclusion on grounds legally insufficient, it would naturally be a prominent subject of attack, more particularly as the motion expressly aims at supporting the deed as not open to the objection of not providing for all the creditors.

I am very strongly of opinion that the Divisional Court was the proper place to set right any objection of this

character, and that it is too late now to insist on the insufficiency of the evidence. I should further have expected to find in the reporter's notes of the trial some evidence of a real contest on this subject, and to find the objections of plaintiff's counsel stated with some distinctness.

Every proper relief on this question could and ought to have been obtained from the Divisional Court. If that tribunal improperly refused such relief, it would then of course be competent to review their judgment.

In the reasons of appeal the objection is not set out that the goods had never been sent, but that it did not appear that the goods ever reached Thompson, and were retained by him, and that it was submitted that no debt had been proved.

I cannot therefore consent to enter into a criticism of the evidence for the first time in this Court, the more especially as on the face of that evidence, without minute criticism, I think it more than probable that the goods were really shipped and received.

I think by allowing the objection at this stage we will establish a most dangerous precedent, and one calculated largely to increase the cost of litigation.

I think we are bound to consider the case, assuming the existence of the Sinclair claim. It is very unfortunate that an apparently fair assignment for creditors should be defeated by the omission of this small claim. It is especially unfortunate when the objection is urged, not by or on behalf of the omitted creditor, but on behalf of an execution creditor seeking to be paid in full. The whole difficulty arises from the frame of the deed.

Must we hold that he is excluded from benefit under the assignment, or that the absence of his name from the schedule avoids the deed at the instance of the plaintiff, an execution creditor?

The deed recites that the debtor is "desirous of making a fair and equitable distribution of his property and effects among his creditors for the purpose of paying and satisfying ratably and proportionately, and without preference

and priority, *all the creditors* of said party of the first part their just debts."

In consideration of the premises he assigns all his estate, &c., "more particularly enumerated and described in the schedule hereto annexed, marked schedule A."

After payment of costs and expenses, then in trust, to "pay and discharge in full the several and respective debts, bonds, notes, or sums of money due or to grow due from said party of the first part, or to which he is liable to said party of the second part, and the several other persons and firms designated in the schedule hereto annexed marked schedule B. \* \* and if such net proceeds and avails shall not be sufficient to pay and discharge the same in full, then such net proceeds and avails shall be distributed *pro rata* share and share alike among the said several persons and firms named in said schedule B, according to the amount of their respective claims."

It appears that in the preparation of the assignment a person (Isaac McLean) was sent up to examine the affairs and books, debts and assets. He did so, and made a list of every creditor appearing on the debtor's books. This he did in conjunction with the debtor, and he had no reason to suppose that any creditor was omitted. He made out the two schedules, A and B, from the information he thus got.

Our first difficulty is to meet the objection that this debt is not provided for, not being in the schedule.

In *Gault v. Baird*, in this Court, 4 A. R. 439, there was a deed under the Insolvent Act, between the insolvents of the first part, certain sureties of the second part, "and the several persons, &c., who are creditors of the parties of the first part, and who are mentioned in the annexed list of the third part."

The late Chief Justice Moss, Burton, Morrison, J.J. A., Patterson, J. A., *hesitante*, held that only the scheduled creditors took under the deed.

Moss, C. J., says: "No authority to add creditors to the list after execution by the sureties could be implied by

law. If such authority existed it must be derived from the express terms of the instrument itself."

*Buvelot v. Miles*, L. R. 1 Q. B. 104, relied on in the judgment below is very explicit.

The deed was between the debtor of the first part and the several persons whose names, &c., are thereto subscribed, being severally creditors, "and all other persons being creditors of the debtor," reciting that he was indebted to them and proposed to pay a composition to them, &c., which proposal was accepted by a majority in number representing three-fourths in value of said creditors, as appeared by the hands, &c., of such majority, signed and set on the first and fourth columns of the schedule thereunder written. It witnessed that the debtor did covenant with said persons, parties thereto, that he would pay unto the said persons respectively the several sums of money placed opposite to the respective names of the said persons in the third column of the said schedule, being the amount of said composition \* \* and that said persons parties thereto of the second part should not commence any action against the debtor.

The first column of the schedule contained the signature of the creditors; the second the amount of the debts; third, the amount of composition; fourth, the seals of the persons executing.

The holder of a bill accepted by defendant brought his action.

The debtor pleaded the deed in bar, and averred that he did not know who was the holder of the bill or that plaintiff was his creditor, that as soon as he knew this he tendered the composition notes to him and the deed for his acceptance, to execute and have his claim and composition inserted, &c.

Replication, that plaintiff never executed or assented to the deed, and the debt sued on was not mentioned in the schedule.

It was held on demurrer the plea was no defence.

The Court held that the deed had no application to a



debt not comprehended in the schedule; that it was clear the debtor did not then contemplate his liability on the bill, probably had forgotten it; that the plaintiff could not have insisted on his right to the composition, nor brought an action, because the amount was not specified in the schedule.

Lush, J., said, that though the deed contained a recital that seemed to shew that it was the intention of the debtor to compromise with all his creditors, "yet when we come to the effective part of the deed we find the covenant is limited to the payment of the sums specified in the schedule \* \* \* there is no provision in the deed for those creditors whose names are not mentioned in the schedule, and the deed is no bar as against them."

Cases have several times occurred as to the extent of the property passing when words at first sight are general, and then explained by reference to a schedule.

As I understand the rule, it seems generally to require the property that is to pass is to answer, as it were, both descriptions, and general words are restricted by the reference to the enumeration in the schedule.

In *Wood v. Rowcliffe*, 6 Ex. 407, a bill of sale assigned to Ball the household goods and furniture of every kind and description whatsoever in the house, No. 2 Meadow Place, more particularly mentioned and set forth in an inventory or schedule of even date herewith, and given to R. on the execution hereof. The inventory did not mention all the goods in the house. "Held, that no goods passed under the bill of sale except those specified in the inventory": that this was not a case of *falsa demonstratio*; but that the operative words of the bill of sale were restricted by what followed, so that nothing passed but what was in the inventory. *Dyer v. Green*, 1 Ex. 71, may be also referred to, also *Kingston v. Chapman*, 9 C. P. 133.

It is then urged that this omitted debt may still have the benefit of the assignment, and Sinclair be admitted to the schedule.



In *Gunn v. Adams*, 8 U. C. L. J. N. S. 211, a decision in the Master's office by the present Mr. Justice Taylor, some authorities there cited are relied on, especially a judgment of Wood, V. C., in *Whitmore v. Turquand*, 1 J. & Hem. 444, in Appeal 3 Deg. F. & J. 107. That was under a composition deed, the trusts being limited to creditors who should come in and accede to the deed within a named time. Certain creditors who neither assented to nor dissented from the deed during such time were, under the circumstances, afterwards admitted to share in the benefit of the composition, together with those who had acceded thereto within the time.

The Court held that, ever since *Dunch v. Kent*, 1 Vern. 260, the doctrine was that the time limited for the creditors to come in is not of the essence of the deed.

I can find nothing in the judgments to help us in this case.

Reference was made to the expression of Wilson, C. J., in *Thorne v. Torrance*, in Appeal, 18 C. P., at p. 35, that equity would compel the admission to the deed of creditors not in the schedule. I have read the cases to which he refers for this position, but can find nothing in them to sanction the view.

I am compelled to hold that the construction placed on the deed by the Judge at the trial, and by the Divisional Court, is right.

*Buvelot v. Miles*, L. R. 1 Q. B. 104, was in some respects stronger in favour of the appellant's view than the deed before us.

It has been suggested that there was no intent here to defeat or delay creditors, and that the deed might therefore be upheld as against the Statute of Elizabeth. No such point was urged at the trial, or on the motion or argument in the Divisional Court, nor is it pointed at in the reasons of appeal.

If it be a deed by an insolvent debtor of all his property in trust to pay some but not all his creditors it must, I think, be held void under our statute R. S. O. ch. 118.

I prefer to consider its legality wholly under that statute. The mischief sought to be remedied as far back as the Upper Canada Consolidated Statutes was the giving of preferential assignments in favour of certain creditors. It seems to me that all such transfers were declared illegal, except the assignment for all creditors without preference or priority.

The words "with intent to defeat or delay" should, I think, be read as descriptive of the ordinary and inevitable effect of any such deed by a man unable to pay his debts and with a number of creditors.

Lord Hatherley says, in *Freeman v. Pope*, L. R. 6 Chy. at 540: "It would never be left to a jury to find *simpliciter* whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the Judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so. A jury would undoubtedly be so directed, lest they should fall into the error of speculating as to what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case."

The fact here of the omission of one creditor from the benefits of the assignment would of course be to delay, if not to hinder and defeat his remedy.

It may be urged that here the omission was wholly accidental or unintentional.

The assignor was not called as a witness, and it may have been as argued

But if by accident a large debt, or several debts had been forgotten or omitted from carelessness, could the scheduled creditors, largely benefited by the exclusion of the others, be allowed to take such an advantage? I think the assignee could not, without a breach of trust, pay any but the scheduled creditors. I also think it immaterial that we may assume the omission to have been accidental.

In *Buvelot v. Miles*, L. R. 1 Q. B. 104, the Court assumed that the debtor had forgotten the existence of the bill that he had accepted. So here it may be that the assignor forgot the small claim of Sinclair.

I so much regret the decision at which I have felt bound to arrive, that if the plaintiff can shew on affidavit, on a Chamber application, any substantial reason to question the existence of this debt, I would allow a new trial, on payment by him of the costs, including the costs of the appeal.

BURTON, J. A.—It is contended in this case that the deed is invalid under our Statute, inasmuch as upon its face it provides only for the payment of the scheduled creditors, and the learned Judge who tried the case has found that there was at least one creditor whose name was not included.

The first question to consider, therefore, is, what is the proper interpretation of the instrument. If the terms of the deed do not in point of fact preclude the omitted creditor from taking the benefit of the trusts, there is an end of the question.

It is contended on the authority of a *dictum* of one of the learned Judges, in *Thorne v. Torrance*, 18 C. P. 35, that there is nothing in the terms of an instrument similar to this to prevent the trustee from placing other creditors' names in the schedule and that the Court of Chancery would compel him to do so. If that expression of opinion had fallen from an Equity Judge I should have felt more hesitation than I do at present in questioning its correctness; but I have referred to all the cases relied upon by the learned Judge for that opinion, and I do not think they at all sustain it.

The first is the case of *Harthy v. Wall*, 1 B. & Al. 103, and merely decides that when a creditor signs and seals a composition deed, although he does not set the amount of his debt opposite to his name, yet he is bound by the

terms of the composition to the amount of his then existing debt.

Few of us would dispute that as a proposition of law, but it does not affect this question.

He then citess *Whitmore v. Turquand*, 3 Deg. F. & J. 107, which merely decides that where the intention was that all the creditors should come in and take a dividend and a period was named for creditors to come in, the time so limited was not of the essence of the deed, but was introduced for the purpose of hastening the arrangement; and that a creditor therefore for whose benefit the deed was made, was not excluded from the mere circumstance that he had not come in within the limited time, unless he had done something to repudiate it.

The next case is *Borell v. Dann*, 2 Hare 440; but that does not establish that a debtor or his assignee, under a voluntary assignment, could add to the names of creditors to be benefited by the trust, but simply that a person under an Insolvent Act could not, by inserting only certain creditors in his schedule, prevent other creditors not named from proving on the estate, and participating in the dividends.

The next case is *Clapham v. Atkinson*, 4 B. & S. 722. That was a case under the Bankruptcy Act of 1861, which provided that a composition deed executed by a majority in number representing three-fourths in value of the defendant's creditors was binding on the plaintiff, who had not assented to or executed the deed.

It was objected that the deed was made only with the creditors who had signed, but not with all; but the Court held that all had the option of coming in and signing, and if the requisite majority signed, it was binding on the others.

*Hickmott v. Simmonds*, L. R. 2 Eq. 462, the last case cited by the learned Judge, appears to me to be rather an authority against the position for which he was contending.

That was also a composition deed under the Bankruptcy



Act. The deed purported to be made between the debtor of the first part, trustees of the second part, described as trustees for themselves and the rest of the creditors parties thereto; and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors, *and all other persons creditors of the assignor*, of the third part. It contained a recital that the assignor was indebted to the parties of the second and third parts in the sums set opposite to their respective names in the schedule annexed, and granted all his real and personal estate to the trustees upon trust to sell and convert into money, and to pay ratably and proportionably and without any preference or priority themselves and the other persons parties of the third part, the several debts set opposite their respective names in the schedule.

It was contended there that the schedule was only a schedule of debts, and that there was nothing to prevent the trustee to insert any one whose name had been accidentally omitted. On the other hand it was urged that although the deed purported to be for the benefit of all creditors (and to be effectual it necessarily must have been so) yet the effect of the recital and the declaration of trust was to confine the benefit of it to those creditors named in the schedule.

It was held that although it was true that all the creditors were parties to this deed in the sense that they were expressed to be parties to it, yet the trust was to pay the sums set opposite to their respective names in the schedule. That no person could have the benefit of the deed unless he were a *cestui que trust*, and no person was a *cestui que trust* unless he was named in the schedule.

*Buvelot v. Miles*, L. R. 1 Q. B. 104, is a similar instance. The deed purported to be made with all the creditors, but the covenant was to pay the dividend to the creditors mentioned in the schedule, and it was held, notwithstanding that the deed professed to be with all the creditors, no creditor who was not mentioned in the schedule was entitled to the benefit of the deed.



There, as here, the deed, if it could not be construed as made for the benefit of all creditors, would be inoperative and void, and it was urged that the Court should place such a construction upon it as would uphold the deed. Lush, J., says: "Although the deed contains a recital which seems to shew it was the intention of the debtor to compound with all his creditors, yet when we come to the effective part of the deed, we find that the covenant is limited to the payment of the sums specified in the schedule."

The same construction was recognized in this Court in the case of *Gault v. Baird*, 4 A. R. 436, and I may remark in the same connection that the case of *Sellin v. Price*, L. R. 2 Ex. 189, seems opposed to the view suggested by my Brother Patterson in that case, that the class of creditors to be benefited was not confined to those alone who were then included in the schedule, but might be extended so as to embrace others to be added subsequently to the execution by the assignor. It was there held that the annexation of a schedule to the deed after execution, which thus became part of the deed, altered the deed in a material particular and made it void.

I do not question that a deed might properly be so framed as to allow the trustee to permit any *bond fide* creditor to be added to the schedule. And if a schedule is to be used at all, it would be a wise precaution to insert such a power; but in the absence of express authority the trustee would have no power to add to the number of the *cestuis que trust*.

I quite agree with the learned Judge who delivered the judgment of the Common Pleas, that the recital might be referred to if the language of the operative part of the deed was ambiguous, but that is not the case.

I come to the conclusion, therefore, that upon the true construction of this deed none but the scheduled creditors are entitled to the benefit of it.

The learned Judge at the trial came to the conclusion upon the evidence that Sinclair was a creditor of the

assignor. The Court below affirmed that finding, and held that there was at least *primâ facie* evidence to sustain it.

It was not attempted to be shewn on the motion against the judgment that in truth the goods never were received, and I do not think that, under these circumstances, we should be justified as an Appellate Court in reversing that finding of fact.

I agree with my Brother Patterson, that upon the facts disclosed in evidence this deed cannot be avoided as having been made by the debtor with intent to give a preference.

This Act, though intended to prohibit any deed made with intent to give a preference, differs materially from a Bankruptcy Act.

The aim of the one is to vest all the estate of the debtor, whether with his consent or without it, in a trustee for equal distribution among all his creditors.

This is intended to prevent fraud on the part of the debtor by a transfer of his property, either with intent to defraud or delay his creditors, or with the intent to prefer and it is incumbent on a party assailing such a deed to prove it was executed with one or other of these intents. If therefore the Act, instead of invalidating a deed made with intent to defeat or delay creditors, had confined its operation to deeds made with intent to prefer one creditor over another, I should hold that there was no evidence whatever of such intent, but that the creditor's name had been accidentally omitted, and that the plaintiff had failed to satisfy the onus that was upon him of shewing the fraudulent intent. But the execution of this deed had necessarily the effect of delaying creditors, and must therefore be *prima facie* presumed to have been made with that intent.

It is true that under the Statute of Elizabeth, which is similar in its terms to the first branch of our own statute, that presumption was rebutted whenever it appeared that the deed which withdrew the property from the reach of

an execution creditor was made for the benefit of creditors, although the particular creditor and others might be excluded, but after the passing of our own Act it is obvious that the Courts could no longer act upon that principle, and yet there might be a middle class of cases like the present, in which no fraudulent intent to prefer could be made out.

It is not improbable that it was in this view that the Legislature added the declaration to be found in our statute, that nothing herein contained shall invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of such debtor their just debts.

When therefore the whole facts connected with this deed are elicited we find that it does not in fact provide for such equal distribution of the assets, and does not come within the protection that that clause was intended to give.

Is not the concluding portion of the section equivalent to a declaration that whereas before the statute an assignment for the benefit of creditors, even with preferences, could not be construed into a violation of the statute, that shall no longer be the case unless the assignment be one by which all creditors are placed on an equal footing, and that inasmuch as it is now apparent that although the debtor actually did intend to make such assignment for the benefit of all, still as that is not its legal effect and operation it cannot be relied on as a valid deed against creditors who are defeated or delayed by it.

I think we must now hold that the person whose name was omitted was a creditor, and that being so, we are precluded from holding the deed valid.

I think, therefore, the appeal must be dismissed, with costs.

PATTERSON, J. A.—The deed of assignment, the validity of which is in question on this interpleader issue, bears date

26th May, 1882. The parties to it are Albert W. E. Thompson, who is the party of the first part, and the plaintiff who is the party of the second part. The creditors are not parties to the deed. The firm of which the plaintiff is a member appears in the list of creditors, but the plaintiff is not made a party to the deed in that character.

The deed recites that Thompson is unable to pay his debts with punctuality or in full, and is desirous of making a fair and equitable distribution of his property and effects among his creditors for the purpose of paying and satisfying ratably, and proportionately, and without preference or priority, all his creditors their just debts; and proceeds: "Now, therefore, this indenture witnesseth that the said party of the first part in consideration of the premises, and of the sum of one dollar to him in hand paid by the said party of the second part, hath granted," &c.

The transfer is of all the lands and personal estate of the assignor, "more particularly enumerated and described in the schedule hereto annexed, marked Schedule A." That schedule shews chattel property valued at \$3,358.18; book debts and notes \$2,307.05; and real estate \$1,466.80. In the last amount there is one item, "store lot \$1000" which I suppose represents the premises where the business was carried on. The trusts are to take possession forthwith of all the assigned assets and convert the whole into money, and with the proceeds to *first* pay expenses of carrying the assignment into effect, and all rents, taxes, and assessments due or to become due on the lands until the same shall be sold and disposed of; and with the residue *first* to "pay and discharge in full the several and respective debts, bonds, notes, or sums of money due or to grow due from the party of the first part, or to which he is liable to the said party of the second part and the several other persons and firms designated in the schedule hereto annexed marked schedule B, together with all interest moneys due or to grow due thereon; and if the said net proceeds and avails shall not be sufficient to pay and discharge the same in full, then such net proceeds and



avails shall be distributed *pro rata*, share and share alike, among the said several persons and firms named in the said schedule B, according to the amount of their respective claims; and *secondly*, the said party of the second part shall return the surplus of the said net proceeds and avails, if any there be, to the said party of the first part, his executors, administrators, or assigns." Then follows a power of attorney, the terms of which I shall read, as I may have to notice them again: "And for the better execution of these presents, and of the several trusts hereby reposed, the said party of the first part doth hereby make, nominate, constitute, and appoint the said party of the second part, and his executors, administrators, and assigns, his true and lawful attorney, with full power and irrevocably with full power and authority to do, transact, and perform all acts, deeds, matters, and things which can or may be necessary in the premises, as fully and completely as the said party of the first part might or could do were these presents not executed."

At the trial of the issue before his Honor Judge Sinclair, who sat for me at Hamilton, the assignment was attacked on several grounds. Some of these were found in favour of the validity of the assignment; but there were two grounds on which the learned Judge was of opinion that the assignment was preferential, and therefore could not be sustained against creditors. He considered the direction to pay out of the general estate, and before payment of any debts, the taxes and assessments, which though charges on lands were not necessarily debts, was one thing which gave the assignment a preferential character. I merely mention this point without stopping to state the argument by which the learned Judge supported his view, because it was not discussed in the judgment of the Court of Common Pleas, which proceeded on the other ground which I am about to deal with; and it has not been insisted on in argument before us, though formally taken in the reasons against the appeal. The other ground, and the one which is the subject of the real contest, was, that payments were to be



made only to the creditors named in the schedule, and that one creditor at least was omitted.

Upon this ground I take a different view both of the law and of the evidence from that on which the learned Judge at the trial, and the Court *in banc* proceeded.

It was considered that under the terms of this deed no creditor could share in the estate unless at the time of the execution of the deed his name appeared in the schedule ; and that if any creditor was omitted the result was a preference of those whose names were inserted, which, under the effect of R. S. O. cap. 118, sec. 2, rendered the assignment void against creditors.

I shall presently attempt to explain why I venture respectfully to dispute both of those propositions ; but I shall first deal with the facts.

The learned Judge at the trial held that one Alexander Sinclair, whose name was not in schedule B, was a creditor of Thompson to the amount of \$26.86 and interest, at the time of the assignment ; and in the Common Pleas it was considered that the evidence, *primâ facie* at least, established that debt.

The deed was executed at Thompson's place of business at Gore Bay. It had been prepared in Toronto, where the plaintiff resides, and was taken to Gore Bay by the plaintiff's son, Isaac H. McLean, for completion. Isaac was examined, and proved that he took great pains, with the aid of Thompson, to include in schedule B all the creditors. He said on this point:

"I landed at Gore Bay on the night of the 25th of May. It was midnight. The following day I took a statement of his affairs and made out from his books, with his assistance, a full and complete list of his creditors, so far as he told me, and so far as the books shewed. \* \* We were engaged all day Friday and until Saturday noon, taking stock and examining the accounts. I went through every book he had in his place. He had a day-book, sales-book, and a journal. He represented that they were all the books he had, and contained all his business. He went

over the schedules A and B with me. I had no reason to suppose that any creditors were omitted or accounts; he said there were none omitted."

Thompson was not called as a witness; but, to prove the debt alleged to be due to Alexander Sinclair, that gentleman was called. He is a manufacturer of pottery at Kilsyth, a village some miles from the port of Owen Sound. He said he sold goods to Thompson, on 24th September, 1881, to the amount of \$26.86, which had not been paid for and had not been returned. He was asked, "Do you know whether the goods ever reached Thompson?" and answered, "I do not know. I shipped them. There was no boats lost at that time. I do not know what ship they were sent by." Having produced a receipt or shipping bill dated 30th September, 1882, he was asked by the Judge, "In shipping the goods did you get that receipt from the master of the vessel with whom you shipped them?" and his reply was: "This is from Miller & Laird, the agents for the warehouse."

I believe I am right in saying that this is the whole evidence of the sending of the goods in question, though some of the statements may have been repeated in other forms by the witness. It seems to me very evident that the witness was not speaking from his own knowledge when he said the goods had been shipped. He would at least have known on what vessel he saw them. His information, whether from personal knowledge or from hearsay, does not seem to have reached further than the warehouse where the goods were stored for shipment, and he had neither a receipt from the master of the vessel nor from the supposed consignee.

The witness produced a paper of which he said, as the evidence is noted, "Exhibit E is my account against him." It is a printed slip intended for both price list and invoice. It contains in print thirty-three kinds of wares manufactured at the pottery, with the prices per dozen printed opposite each, and is converted into an invoice by writing at the left of each kind sold the number of dozens, and

extending at the right the price of the quantity. In this paper quantities are marked and prices extended at fourteen of the thirty-three printed items, and there is added one item which was not provided for in print, viz: "2 spittoons, 50 cents each, \$1.00." The whole adds up \$40.28, from which one third is deducted for discount, leaving \$26.86. The account is dated September 24th, 1881. The witness also produced a letter received from Thompson, dated Gore Bay, September, 16th, 1881, in these words :

"MR. SINCLAIR, Kilsyth,

DEAR SIR,—Would you kindly send me a list of your goods, as I need some, and cannot order without it.

You might send me an assorted order of milk pans.

4 dozen each.

4 " " high crock cream crocks, and oblige

Yours truly,

A. W. E. THOMPSON."

as the order in pursuance of which the goods were sent.

A comparison of the alleged copy of invoice with this order shews that the two are far from corresponding in respect of the goods ordered in the one and charged in the other. There is no suggestion made by the witness that the goods which he asserts to have been ordered, shipped, and not paid for, were ordered otherwise than by this letter. The discrepancy between the two documents is of importance for a very plain reason.

If it is urged that a debt was created as soon as the goods were shipped, which, as I am about to shew, is the view taken by the learned Judge, then it is essential that the order shall have been followed. But if the shipment was of goods different from or in excess of those ordered, then no debt can be established without proof of receipt and acceptance.

There is still some of Sinclair's evidence to notice, but before doing so I shall read from the judgment of the

learned Judge what he said respecting the matter. This is the passage:

“11. That Alexander Sinclair was a creditor of Thompson to the amount of \$26.86 and interest at the time of the assignment, and that he could not participate in the benefits of it. Thompson gave an order on the 16th of September, 1881, in these words: ‘You might send me an assorted order of milk-pans, 4 doz. each: 4 doz. each light crock cream crocks; and oblige yours truly, A.W. E. Thompson.’ Sinclair had previously sold Thompson goods under written orders, and shipped them by steamers. He said he had sent these in the same way. There was no proof of their receipt by Thompson, but the boat had not been lost. I think the goods were at the purchaser’s risk when given to the carriers. See *Addison* on Contracts, 7th ed., 456-470, and cases cited; *Benjamin* on Sales, 2nd ed., 281.”

Thus it appears that he treated the debt as created by the shipment, and took that to be sufficiently proved by Sinclair’s evidence. He apparently was prepared to infer the receipt of the goods by Thompson from the fact of shipment, when there was nothing to account for their not having been received. That would, in my judgment, be going a good way, as it would ignore many chances of carelessness, or casualties, or mistakes in delivery at wrong places, &c. I would not, however, be disposed to quarrel with that inference if there was legal evidence, which I doubt, of any shipment, and if the receipt was essential. My object just now in quoting the learned Judge’s note rather relates to what I am shortly about to notice.

I make a further extract from the report of the evidence:

“Q. What was the arrangement as to shipping these goods? A. I was to ship the goods, that was all. When we ship the goods we generally suppose they are in their hands. I sold goods to him on previous occasions just the same as this. I sold goods to him in 1880, and the arrangement was that I was to ship the goods from Owen Sound, and I did so, and I have sent the invoice also, and I have written to him several times and he paid no attention, but in February sometime, the goods he was to pay in thirty days, he called in and gave his reason why he



*did not pay us.* I had written to him several times on this occasion and I thought it would be the same as on this occasion. This letter was written on a similar occasion previously. [Producing letter]. Q. The arrangement with him was that you was to ship the goods to him from Owen Sound to Gore Bay? A. Yes.

"MR. OSLER.—Was that in the letter? A. Yes. Q. Where is the letter? A. I haven't it here.

"MR. WALKER.—Have you an order? A. Yes. (Producing). Q. This is the order you sent in pursuance of that order? A. Yes—dated Sept. 16, 1881.

"THE COURT.—Is that the usual way of transmitting goods from Owen Sound to this man's place? A. Yes."

I read this for the sake of referring particularly to the words I have italicized. If they had relation to these goods, they were undoubtedly direct evidence of their receipt—certainly direct evidence against Thompson, and I suppose also evidence on this issue. And they would be not only direct evidence, but evidence much stronger and more conclusive than anything else said by the witness. But I do not understand those words to refer to this alleged debt, and no one concerned in the trial seems to have so understood them.

The learned Judge, in noting the evidence on which he found the debt, would not have overlooked the most cogent piece of all, if he had so understood this expression of the witness. The witness himself, when asked the question, "Do you know whether the goods ever reached Thompson?" would have at once answered "Yes, he told me so, and excused himself from paying promptly," instead of saying, "I do not know," and reasoning from no boat having been lost; and the defendant's counsel had, immediately before adducing the evidence, offered to prove that Thompson had, *since the assignment*, said he received the goods. That evidence was properly rejected, and was at a later stage formally offered again, and again rejected.

It is not easy to understand that counsel should press evidence of that inadmissible character, if he understood that he could prove, and had proved a similar admission



made *before the assignment*. The conduct of the counsel, the silence of the Judge, and the answer, "I do not know," of the witness, concur to convince me that however the evidence, which is reported in a manner that bears internal evidence of want of accuracy, may now read as capable of a meaning that would involve the admission by Thompson of this debt, no such meaning was attached to it at the trial. Add to all this that the evidence, loose as it was, was given by the man who sought to establish a debt due to himself, and in the absence of the other party to the transaction, and we have, in my judgment, abundant reasons for holding that the alleged debt was not proved. We may do so without clashing with the Judge of first instance in anything in which his means of judging were better than ours. It results from the discrepancy between the order and the invoice that we cannot follow his honor in holding that the debt arose when the goods were shipped, even if we held with him that a shipment was proved; and when we discuss other views of the evidence on which it is sought to establish a debt, we are upon ground not traversed by his judgment.

Passing now to one of the questions of law, I refer, without here repeating my argument, to what I said in the judgment I lately delivered in *Alexander v. Wavell*, ante p. 135, on the subject of the fundamental requisite of the statute, before it avoids a deed of this kind, being *the intent to defeat, delay, or prefer*. It may be very difficult to convince a tribunal trying the fact that a transfer which creates a preference in favour of one or more creditors was, not made with that intent; but that is a matter of evidence; the principle remains the same. The learned Judge who tried the issue refers to *Mills v. Kerr*, 32 C. P. 68, 7 A. R. 769, as opposed to this view. That is, I think, a misapprehension. What was decided in that case was that a person who executed a deed by which his separate property was directed to be applied in payment of his joint debts, must be held to have intended his separate property to go in payment of his joint debts, or, in other words, to mean

what he said ; although he may really have had no desire to prefer one class of his creditors to the other, and may not have in fact understood the legal effect of the instrument.

The question properly understood was one of evidence.

The question of fact was the intent ; and the assignor had furnished evidence of his intent to prefer one class, by executing a deed which appropriated his estate to one class to the exclusion of another, and he was not allowed to disprove the intent thus evidenced, and so to support the deed against the excluded creditors, by shewing that he executed it under a misapprehension of the effect of what he did. To allow that was, as held in this Court, to furnish an additional reason outside of the statute, for setting the deed aside.

The position here is a different one. It is not disputed that Thompson understood the effect of his deed, and intended the estate to be distributed amongst the creditors whose names should appear in schedule B. But he intended to insert in that schedule the names of all his creditors, and thought he had done so. That is the effect of what Isaac H. McLean tells us ; although his evidence may not, in strictness, affirmatively prove the fact. The perusal of the deed itself, as I have in part set it out, tends strongly in the same direction.

Unless it can be held, as in my opinion it would be contrary to the spirit as well as the letter of our statute, which is not a Bankrupt Act, to hold, that the bare incident of the exclusion of some creditor, no matter by what accident or oversight, or however irrespective of intention to exclude, vitiates the deed, it could not properly be held that the omission of this claim of Sinclair, assuming it to have been proved to exist in law, would avoid the deed before us.

Take the case of a debt created, as the learned Judge seems to have thought that now in discussion was created, by the shipment of goods ordered by letter, and you have an illustration of the fallacy of making the legal liability

of the assignor the test, in place of his motive in framing the deed as we find it. We can suppose an assignment made after the shipment, and therefore after the debt had arisen, but before the debtor knew of the shipment or of the existence of the debt. Could anything be more extravagant than the idea that such an assignment should be held void under this statute, with the effect of letting in executions, because it omitted to provide for the supposed debt, while it carefully named every known creditor? The right to stop *in transitu* does not weaken the illustration. It rather tends to make it more striking, because while the creditor would have the means of securing himself the legal debt would nevertheless exist.

I have already said that I do not think the debt to Sinclair was proved. I now add or repeat that even if, under evidence such as we have, Sinclair could succeed in recovering judgment against Thompson, it does not follow, and is not in my opinion established, that this assignment was made with intent to prefer the other creditors to Sinclair. I think it should on the contrary be held that, conceding for argument's sake that Sinclair is a creditor and is excluded, there was no such intent, but that the omission of his name was from want of information or from inadvertence only.

It was contended that Thompson owed a debt for a safe to the firm of J. & J. Taylor, and that its omission from the schedule also vitiated the deed.

The safe had been purchased or ordered by a written or printed document, dated October 3rd, 1881, by which Thompson agreed to pay for it \$150, in six quarterly instalments, at three, six, nine, twelve, fifteen, and eighteen months from date of shipment; that the title should not pass until the full amount was paid, but should remain the property of the vendors, and that in default of payment of any instalment for one month, the vendors should be at liberty, without process of law, to take and remove the safe. A member of the firm was examined at the trial, and said that when they got notice from Thompson,

calling a meeting of his creditors, which was before the assignment, they notified him that they held a lien on the safe and that it was not necessary for them to attend, and they did not attend. There was no opposition to their taking the safe, and some time after the assignment was made they did take it. The learned Judge asked the witness if his firm made any claim on the estate for the instalments in arrear, and the witness answered: "No, nothing further than that we notified them that we either wanted the safe or the money, and we have got the safe."

Upon this evidence the learned Judge held that J. & J. Taylor had abandoned the debt created by the order, and had elected to resume possession of the safe. I understand him to refer to the notice to Thompson when the firm decided not to attend the meeting of creditors.

I think the finding was fully justified, if not compelled, by the evidence. But if with any pretence of reality it could be said that a debt existed which the Messrs. Taylor could have asserted against the creditors who attended the meeting and advised the assignment, or against Thompson, after he had acted on the notice they gave him, it would be the debt of a fully secured creditor who could not be compelled to rank with the general creditors, and whose exclusion from schedule B could not possibly imply an intention to prefer the others. Had the name of the firm been inserted it might with great force have been urged that a preference was given by letting them share in the general estate while they retained their lien for their whole debt. I see no force in the present objection.

But are the creditors whose names were not in the schedule when the deed was executed necessarily excluded by its terms from participating in the estate? If they are not, then the solution of the questions to which I have been addressing myself is unimportant. But if I am right in the views I have taken of those other questions, it is not important to solve that now proposed. For this reason, and also because the question was not much discussed in the argument before us, although it was not



overlooked in the reasons of appeal, I shall not attempt to do more than state very briefly why I hesitate to adopt the construction of the deed acted upon in the Courts below, while at the same time I do not venture a decided opinion that that construction is not correct.

The purpose of the deed directly expressed in the recital is the ratable distribution of the estate among all the creditors.

The conveyance is expressed to be made upon that consideration. The only parties to the deed are the grantor and grantee, and the purpose of the conveyance as between them is declared as I have stated.

Then come the directions, in the form of a declaration of trust, as to how the purpose of the assignment is to be carried out. The question arises on the direction to pay the creditors named in the schedule, and if there is more than will pay them in full, to return the surplus to the assignor. Some stress was laid, in the Court below, on this reference to the surplus, as affecting the construction of the previous direction to pay, as if the surplus, after payment of a selected number of the creditors, was to be returned to the debtor in place of being paid to the creditors who were not named. But the question whether the trust is for a selected number or for the whole must be settled before the direction as to surplus is reached. The surplus is what remains after paying off all who are entitled to share, and those may be the creditors only who were noted in the schedule when the deed was executed, or also those ascertained and noted afterwards, whichever is the proper construction of the instrument.

What is there in this deed to prevent the assignor adding to the scheduled names any creditor whom he may discover to have been accidentally omitted? If he could do it so may the assignee, either in pursuance of the declared purpose to distribute equally to all creditors or by virtue of the power given him in terms to do all things which can or may be necessary in the premises as fully and completely as the assignor might or could do



if he had not yet executed the deed. "The premises" necessarily include the declared purpose of the deed. That the trustee so interpreted the deed is proved by his advertising for creditors in the *Globe*, the *Gazette*, and the *Manitoulin Enterprise*.

The assignor could not complain of the supplying an inadvertent omission. It would be only doing what his deed declared he intended should be done.

It has been argued that any scheduled creditor could complain if the number of participants that appeared on the schedule when he assented to the deed was afterwards increased. I do not understand that the question whether or not a creditor could be reasonably asked to assent to this deed is at all pertinent to the present contest, as it has been under different circumstances in other cases. But a conclusive answer would be that no creditor could object that the deed put all other creditors on an equal footing with himself; and any creditor assenting to this deed knew that that was its declared object, and knew moreover that to find fault with that purpose would be to insist on a preference, and so to vitiate the deed, if giving a preference would have that effect.

I do not propose to examine the authorities on this subject. I shall merely refer to the judgment of the present Chief Justice of the Queen's Bench, in *Thorne v. Torrance*, 18 C. P. 29 at p. 35, in which reasons were given for considering that the trustee in that case might have placed in the schedule the names of other creditors, if any there were, beyond those originally named. The intention to include all creditors in the distribution notwithstanding the apparent limitation to those named in the schedule, is in the case before us deducible from the deed quite as plainly and satisfactorily as from the deed in question in *Thorne v. Torrance*. I think even more plainly and satisfactorily.

I place my judgment upon the grounds :

1. That there is *primâ facie* evidence that all the creditors are named in the schedule.

2. That this is not displaced by the evidence concerning the alleged debt to Alexander Sinclair, or the debt to J. & J. Taylor.

3. That even if those debts existed in contemplation of law, the assignment was not made with intent to prefer other creditors, but was made for the purpose of paying ratably and proportionably and without preference or priority all the creditors their just debts.

And I am not satisfied that by the true effect of the deed any creditor is excluded, even though not originally named in the schedule.

I therefore think we should allow the appeal.

CAMERON, C. J.—The right of the appellant to the goods, the subject of the interpleader issue in the Court below, depends upon the proper solution of the questions raised affecting the validity of the deed of assignment under which he acquired the goods from the defendant's execution debtor, A. W. E. Thompson. These questions are two, the first being directed against its validity, as being upon its face, without the aid of extrinsic evidence, contrary to the letter and spirit of sec. 2 of chap. 118 R. S. O., by the terms of the deed, taxes and rent being made preferential claims upon the proceeds of the trust property. The second depends upon extrinsic evidence, but is in effect the same objection in another shape, that is, the deed does not provide for a ratable distribution of the debtor's assets among all his creditors, but confines such distribution to the creditors named in the schedule B. attached thereto; and the evidence discloses that at the time of the assignment there was certainly one, if not two, creditors not named or referred to in the schedule.

Taking up the consideration of the first question, it appears to me a deed making provision for the payment of taxes or rent as a first charge upon the proceeds of the property assigned, is not necessarily rendered void, unless it appears that there were taxes or rent due and payable at the time of the assignment, or growing due, so that

there would be creditors in respect thereof to be preferred, and that such taxes and rent were not in a position to be levied or distrained for upon the goods assigned. If in fact neither rent nor taxes were payable by the assignor, the insertion of a provision giving them a preference would not hurt or prejudice any one, and there would be nothing upon which the preference could operate. In the present case there is no evidence whatever, except that furnished by the deed itself, to shew that any claim for rent or taxes existed. The deed does not specify any particular tax or rent, and there is no mention of any creditor in respect of taxes or rent in schedule B. The provision as to taxes and rent was probably inserted by the conveyancer out of an abundance of caution, upon the supposition that if such claims existed they would in fact be claims that could be enforced against the assigned property, notwithstanding the assignment, and the provision would justify the trustee in the interest of the trust estate in paying off such taxes or rent without allowing the same to be enforced by sale or distress of the assigned property.

But taxes or rent might be due by the assignor in such a way as to constitute a mere debt or claim against him, which could not be levied without the intervention of a suit and judgment and execution in the ordinary way,—in which case a provision such as that contained in the deed under consideration, would be a preference of the special creditor that would render the deed null and void, and the assignor or assignee would not be permitted to say they did not intend it to have the effect of giving such a preference, because that would be in direct contravention of the express terms of the deed and not merely in opposition to its legal operation.

If taxes or rent exist as claims and are immediately enforceable against the debtor's effects, I do not see that making provision for their payment in a deed of assignment for the benefit of creditors generally is opposed to the spirit of the second section of the Act. That cannot be deemed a preference which gives to a creditor no more

than he can at once enforce, whether the deed provides for him or not. Such a provision as that contained in the deed might under some circumstances be in the interest of the general creditors, in enabling the assignee to make arrangements that would prevent the trust estate being sacrificed by an immediate enforced sale. The question was considered as to the effect of a somewhat similar provision in *Watts v. Howell et al*, 21 U. C. R. 255, but was not determined, there not being a consensus of opinion among the Judges, Mr. Justice Burns holding it to be a provision that invalidated the deed. His opinion was expressed as follows: "The deed of assignment provides for payment, first of all, in full of all executions at the date of it in the hands of the sheriff of the county of Brant, or of any bailiff of any Division Court of the said county. It is argued on behalf of the assignee that the provision cannot invalidate the deed because such a provision is only in accordance with the law. The answer to that argument, however, is, that there may be executions lying in the hands of the sheriff, upon which possibly he has done nothing, whereby if the creditors had a lien upon the debtor's property the lien has been lost. Then as to the Division Court executions, no lien on the debtor's goods exists until the bailiff actually seizes or does what is equivalent to it."

The Chief Justice, Sir John Robinson, said: "If I had to determine upon the admissibility under the statute of that provision which directs that all executions in the hands of the sheriff or of the *bailiff of any Division Court* shall be paid in full, I should agree, I think, in the view taken of that by my Brother Burns, for certainly unless such executions had been levied under before the assignment, they would not be entitled to be paid before other creditors, and so far the assignment would give to them a priority which otherwise they would not have, over other creditors, if the assignment had been executed before any seizure had taken place under the executions, and so far



the assignment would have given them a preference to which they were not entitled."

Mr. Justice McLean, at page 259, intimated that he should feel bound to support the assignment if it were not for the direction that the proceeds of the estate, if insufficient to pay all the creditors, should be divided amongst those named in the schedule, and that it did not appear to him that there was any intention to give a preference to any class of creditors, though from the wording of the assignment that would probably be the effect."

In *Kerr v. The Canadian Bank of Commerce*, 4 O. R., 652, the Queen's Bench Divisional Court held in a similar deed that a permission to the trustee to pay off liens on the estate did not invalidate the deed.

The transfer of the property would not prevent the levying of rent or taxes thereout, while it remained on the premises in respect of which the taxes accrued. It cannot therefore be said that the language of Sir John Robinson in *Watts v. Howell*, 21 U. C. R. 255 was opposed to the view I have just endeavoured to present.

In *Andrew v. Stewart*, 6 A. R. 495, the late Chief Justice of Ontario appeared to think a "preference of execution creditors would not be objectionable in an assignment for the benefit of creditors." It was not essential to the decision of that case, though the question arose, to determine the point. The assignment in question here is freer from objection than that under consideration in *Andrew v. Stewart*, as that gave a preference to privileged creditors as well as execution creditors without defining who would come under the description of privileged creditors.

But I am of opinion that under sec. 2 of ch. 118 R. S. O., the intent with which an assignment is made must be looked at in determining whether it is or is not void. The word intent inserted in the clause could not be intended to have no meaning. The clause does not provide that every assignment or disposition of his personal property made by a man in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of in-



solvency, shall be null and void, but that every such assignment made with intent to defeat or delay his creditors, or with intent to give one or more of his creditors a preference over his other creditors or over any one or more of such creditors, shall be null and void. It may be as it has been argued that the proviso, that nothing in the Act "contained shall invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably and without preference or priority all the creditors of such debtor their just debts," nor any "*bonâ fide* sale of goods in the ordinary course of trade or calling to innocent purchasers," amounts to a prohibition of every disposition of such debtor's goods not made in the ordinary course of business, or for the purpose of paying and satisfying ratably and proportionably all his creditors.

To my mind that is not the correct reading of the clause, and to so read it is to legislate, not to interpret.

The object of the proviso, so to call it, is to uphold an assignment made by a debtor for the benefit of his creditors generally, though the avowed object and motive of the debtor in making it was to defeat some particular creditor or creditors, and to prevent him or them getting satisfaction of any judgment or execution they were about to obtain against the debtor, and to protect any purchase made by a person ignorant of the debtor's intention, in the ordinary course of business, though the debtor might with the object of defeating his creditors be selling off his goods at reduced prices.

In these two cases the intent should not invalidate the transaction; in all others it should. The Act is not a bankrupt Act. It does not provide for an equal distribution of the debtor's effects. It does not deprive him of control over them, except where he controls them with intent to delay or defeat creditors, or prefer one creditor over another.

This brings me to the consideration of the intent with which the assignment in question was made. The

evidence places it beyond the shadow of a doubt that the debtor made it with the sole and honest object of paying and satisfying all his creditors ratably and without preference or priority. And if it fails to do so, it fails from a mere slip, not from any intention to omit from its benefit or operation the claim of Alexander Sinclair or any other creditor. I am therefore of opinion whether Sinclair was omitted or not the assignment is valid, and this appeal should be allowed. The assignment is in complete accord with the spirit of the Act now invoked to destroy it, as far as the intention of both parties to it is concerned, and its destruction would have the effect of sweeping away from the general body of creditors nearly the entire assets of the debtor to satisfy the claim of one. Courts should be astute to avoid such a result, if it is possible to do so without violating any principle of law.

By holding the assignment valid no legal principle is infringed nor even strained. Before the passing of the Act under consideration this assignment would have been free from all objection, and I am not aware that there is any decision in any of the Courts that has gone so far as to determine the intent with which the transfer of the property has been made must not be regarded in considering the validity of such transfer. The Court below in the present case appears to have treated the fact, assumed to have been proved, that there was a creditor of the debtor not included in the schedule of creditors to receive the benefit of the trusts of the deed as conclusive of the preferential character of the assignment, for which there is no warrant under the statute unless it can be read as prohibiting all transfers not providing for an equal distribution of the debtor's effects.

For the reasons already given, I am of opinion that is not the proper construction of the Act. The case that most nearly resembles this decided under the Act is that of *Kerr v. Mills*, 7 A. R. 769, but it is distinguishable. The deed in that case passed both the partnership effects and those of the individual partners, and provided for the

payment of the partnership creditors only. The Court held, as I understand the decision, that against the terms of the deed, which upon its face gave this preference to a class of creditors to the exclusion of others, the parties could not be heard to say they intended differently. Here the deed recites that the assignor was desirous of making an equitable distribution of his property and effects among his creditors for the purpose of paying and satisfying ratably and proportionably, and without preference, all his creditors; but the deed having been framed before the schedule in which the parties intended all the creditors should be named was prepared, and before the execution of the deed, the trust was declared to be for the creditors named in such schedule.

It required extrinsic evidence to shew that other creditors existed to invalidate the apparently valid deed, and I see no reason why, when that extrinsic evidence was given, it was not permissible, in rebuttal of the inference to be drawn from the omission of the creditor's name, that it was from accident and not design; and I have no doubt whatever that the omitted creditor could have had his name under the facts here disclosed inserted in the schedule. No doubt, as the deed has been framed, its benefits are confined to the creditors named in the schedule. The case of *Buvelot v. Miles*, L. R. 1 Q. B. 104, is to that effect. That case was no doubt well decided. The bankrupt sought to relieve himself from liability to the plaintiff, his creditor, under the discharge worked by the operation of a deed of composition under the English Bankruptcy Act. The plaintiff was not included in the schedule, and in an action brought by him to recover his debt from the bankrupt, it was held the deed of composition was no bar. The deed here would not under any circumstances be a bar, and had no effect whatever on Sinclair's right of action against the debtor Thompson. His rights were not imperilled by the deed.

In *Brayley v. Ellis*, 9 A. R. 565, in a well considered judgment, my learned Brother Burton, the question being whether a chattel mortgage was void on the ground

that the mortgagee was getting thereby a preference over the other creditors of the mortgagor, expressed the opinion that to invalidate such a mortgage on the ground of preference it would be essential that the mortgagee and mortgagor should both participate in the intent. I quote his language as it puts the point more forcibly than I could. It is as follows: "Under the Act we are now considering, it is necessary, I apprehend, to shew an intent both on the part of the grantor and grantee to invalidate the transaction. There would seem to be no good ground why one creditor having succeeded without pressure in obtaining security for a just and *bonâ fide* debt, should be deprived of that security any more than a creditor who has obtained payment from his debtor on the eve of insolvency. Both these transactions are, I assume, protected, unless it can be shewn that the intent to prefer was participated in by the recipient." If this is a correct statement of the law, as to which as far as the intent of the recipient is concerned I do not express an opinion to any greater extent than is involved in the view I have given of the proper interpretation of section two of the Act, it is clear the assignment in this case is unimpeachable. There is not the slightest ground for assuming that the assignee, the appellant, had the least reason to believe there was any such debt as that of Sinclair's in existence. The Court was not unanimous in adopting the result reached by my learned Brother, but the late Chief Justice of Ontario concurred with him in the opinion he expressed and thereby affirmed the Judgment of my learned Brother Ferguson, given in the case in the Chancery Division. At page 577, the learned Chief Justice used this language:

"The Legislature might have left out the words 'with intent to defeat or delay,' 'with intent to give one or more of the creditors a preference,' but the words are there and we must give all due and proper effect to them."

The question of pressure can only in a case like *Brayley v. Ellis*, 9 A. R. 565, have place in considering the intent; and the intent with which an act is done must be a



question of fact. It therefore seems to me a fallacy to hold that as between others and a party to a deed the terms of the deed can be more than evidence of the intent, more or less strong according to the language used and the purpose for which it was used.

Whether there was a creditor omitted from the schedule or not depends upon whether a debt was proved to be due from the debtor Thompson to Sinclair, for I think the claim of J. & J. Taylor, who took back their safe, cannot be considered as existing. With respect to Sinclair's claim I concur in my learned Brother Patterson's opinion that it was not proved. The evidence from the confusion in the reporting is not as clear as it might be. But it appears to me there was not sufficient evidence of the delivery of the goods by Sinclair to Thompson. Sinclair does not say that he knows the goods reached Thompson, or the hands of anyone to whom their delivery in law would amount to a delivery to Thompson.

His evidence is, that the goods were delivered to Miller & Laird, the agents for the warehouse. A delivery of goods to a carrier, where the buyer requests the goods to be sent by a carrier, is a delivery to the buyer; the carrier is his agent to receive them; but I take it, a delivery to a warehouseman to be delivered to a carrier is not the same thing as a delivery to the carrier direct. The warehouseman would be the agent of the seller, while the carrier is, as I have said, the agent of the buyer. On the ground, therefore, that no debt was proved to be due to Sinclair in the Court below, the appellant is entitled to succeed.

But I prefer to rest my judgment on the broad ground that the impeached assignment was made *bonâ fide*, and without any intent whatever to defeat or delay creditors, or to give any creditor or creditors a preference over any other creditor or creditors. I may add that I am not satisfied, that without Sinclair having obtained a judgment or execution, even if his debt had been proved, the defendant could take advantage of the existence of that debt to defeat the plaintiff's title to the goods.



I have not overlooked my own opinion expressed in the case of *Kerr v. The Canadian Bank of Commerce*, 4 O. R. 652, which may seem at variance with that which I am now presenting. That opinion was given in deference to the judgment of this Court in *Mills v. Kerr*, 7 A. R. 769, and against what my view of the law was, which then was as it is now, and was expressed in the judgment delivered by me at the trial in that case. Sitting as a Judge of the Divisional Court, I was bound to accept the decision of this Court in a case which appeared to me to come within it.

But sitting in this Court, it is my duty to express the opinion I entertain in every case that comes before me, and I certainly entertain now the view I did at the trial of *Mills v. Kerr*, and I have less hesitation in giving my present views, as my Brother Patterson, who delivered the judgment of the Court in *Mills v. Kerr*, thinks it distinguishable from the present case.

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## MEMORANDA.

ON the 17th day of November, 1883, The Honourable FEATHERSTON OSLER, one of the Justices of the Common Pleas Division of the High Court of Justice, was appointed one of the Justices of the Court of Appeal.

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ON the 20th day of April, 1884, The Honourable JOHN GODFREY SPRAGGE, Chief Justice of Ontario, died at his residence on Portland street, Toronto.

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ON the 6th day of May, 1884, the Honourable JOHN HAWKINS HAGARTY, Chief Justice of the Queen's Bench, was appointed Chief Justice of the Court of Appeal, with the title of Chief Justice of Ontario, in the room of the Honourable JOHN GODFREY SPRAGGE, deceased.

## HUNTER V. CARRICK.

*Patent of invention—Infringement of patent—Want of novelty.*

*Held*, reversing the judgment of Proudfoot, V. C., reported 28 Gr. 489 ; that the combination of the tilting grate and the feed door above the sole of the oven mentioned in the specification of the plaintiff as the first subject of claim for a patent, was so wanting in novelty as to render the patent obtained in respect thereof invalid. [PATTERSON, J. A., dissenting.]

THIS was an appeal by the defendant from the judgment of Proudfoot, V. C., reported 28 Gr. 489, where the facts sufficiently appear.

The appeal came on to be argued before this Court on the 22nd of October, 1884.\*

*McMichael*, Q. C., for the appellant. The contention on the part of the present plaintiff is principally that the defendant has infringed his patent by having her oven constructed with two doors and a hole on the floor of the oven, into which is placed a common tilting grate. Having either of these appliances, he admits, would not be sufficient to constitute an infringement. The appellant contends, however, that there is not any such combination of the fire pot and the second door, as should be the subject of a patent. The use of the tilting grate in stoves, &c., is certainly old, and yet this forms one of the improvements upon which a claim is put forth for a patent. Where a patent is granted for a novel combination of certain known parts, all such parts must be used and together contribute to the result, otherwise there is nothing on which to found a charge of infringement: *Harrison v. Anderston Foundry Co.*, L. R. 1 App. Cas. at p. 581, where Lord Chelmsford, in delivering the judgment of the House of Lords, took occasion to say, that "if a patent is solely for a combination nothing is protected by it, and consequently nothing can be an infringement but the use of the entire combination."

\**Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

*Cropper v. Smith*, 26 Ch. D. 700, is to the same effect; so also *Withrow v. Malcolm*, 6 O. R. 12.

*Cassels*, Q. C. We admit that unless the whole combination is used there can be no infringement.

The first patent issued was for "a fire pot in a baker's oven," pure and simple; while the second patent is for a combination of five different improvements. Unless the patent is claimed as a combination—if all the grounds are not new—the patent if granted would be void. A man cannot be heard to say there is one good ground in the patent, and therefore the patent is valid.

See also, *Curtis v. Platt*, 3 Ch. D. 135; *Adie v. Clark*, 3 Ch. D. 164; *Dudgeon v. Thomson*, L. R. 3 H. L. 34; *Hinks v. Safety Lighting Co.*, 4 Ch. D. 612; *Penn v. Bibby*, L. R. 2 Ch. 127.

*Cassels*, Q. C., for the respondent, after dwelling at considerable length on the great saving of fuel, and the superior quality of the bread produced by the use of ovens supplied with the respondent's patent heating appliances, as established by the evidence in the case, referred to *Bump on Patents*, to shew that a person using a patented article will not be heard to say that it is worthless. The learned author says: "The objection that the invention is not useful generally comes with bad grace from a person charged with an infringement, because, if the invention is of no utility, then he ought not to use it; and the very fact of his using it shews that his practice and his professions, as regards the utility of the invention, are very much at variance:" 1st Ed., p. 71, and cases there cited. The novelty and utility of the invention are subjects solely for the consideration of the commissioner; and the very fact that a patent has been issued is *primâ facie* proof of novelty and usefulness. In patents for combinations, all the elements may be old: and as to combinations and separate parts, see L. R. 1 App. Cas. at p. 582.

He also referred to *Otto v. Linford*, 46 L. T. N. S. 35; *Spencer v. Jack*, 11 L. T. N. S. 242; *Fay v. Cordesman*, 109 U. S. 408.

November 20th, 1884. HAGARTY, C. J. O.—I have felt some difficulty in ascertaining what it is that the plaintiff claims to be the subject or subjects of his invention.

The patent of 1879 is declared to be “defective and inoperative by reason of insufficient description and specifications.” In the defective patent he claims to have invented certain new and useful improvements in bakers’ ovens.

The object is to economise fuel and allow the fire to be kept in the oven during the whole process of baking, and it consists in placing a fire pot within the oven, but below the sole \* \* (description, &c., &c.)—then “what I claim as my invention is in combination with a baker’s oven a furnace D set within the oven but below the sole, A: substantially as and for the purpose specified.”

The second or re-issued patent has the same recital that he has invented certain new and useful improvements in bakers’ ovens. “The object of the invention is to build a baker’s oven capable of being fed with fuel when in use, and in which the fire can be examined and the temperature of the oven regulated during the process of baking; and *it consists* in placing a fire pot within the oven, its grate being below the sole or hearth of the oven, and its door above the level of the grate, suitable flues being provided as hereafter explained.”

So far the invention is plainly expressed to consist in placing the fire pot within the oven with the grate below the sole, and its door above the level of the grate, with suitable flues.

Then in the re-issued patent he claims as his invention five matters.

The first seems to be that on which the case turned in the Court below, viz.: “A fire pot or furnace placed within a baker’s oven below the sole thereof, and provided with a door situated above the grate substantially as specified.”

It seems conceded that the claim for a door situated above the grate appears first in the re-issued patent.

The decree appealed from restrains the defendant “from continuing to use the oven with the fire pot and feed door



so as to infringe the first clause of the invention described in the re-issued patent."

As the learned Judge remarks, the plaintiff claimed the whole five claims as his inventions. It was considered that he failed except as to the first claim. The fire pot is shewn not to be new, and we fail to find anything on which the claim to a patent right can be rested, except its use in combination with a door situated above the grate instead of on a level with it or below it.

To any one who had never read a patent case and merely received all his ideas on the subject from the words of the statute as to the discovery of "any new and useful art, machine, manufacture, or composition of matter, not known or used by others before the invention or discovery thereof," 35 Vict. ch. 26, it might appear strange that the placing the feed door of the fire pot or furnace a few inches higher than such doors had been previously placed, should be a proper subject on which to ground a claim for a patent and monopoly of user.

If plaintiff claimed the new oven as a combination the result of combining the actions of five subsidiary combinations, each of which he claimed as being his invention, he would apparently fail if one of the subsidiary combinations was a known old invention.

See the very recent case of *Cropper v. Smith*, 26 Ch. D. 700, (C. A.)

In our case he claims himself as the inventor of the five subjects of claim. He succeeds on one only. He says on his examination, in answer to the question

"You claim a patent for each of these five separately?"  
A. Yes.

Q. And not for a combination of the whole five together? A. No, I believe they do not read that way."

This was on cross-examination. He is then asked by his counsel: "You do not claim the different elements as novel, but the combination?" A. Yes."

Mr. Christie, a witness of plaintiff's, in his evidence:

“Q. Take this first claim. A. The advantage of that door being situated above the grate is that the fuel does not tumble out when the door is open to feed it. \* \*

Q. And the economy and the saving of labour, and so on, is occasioned by a combination and the fire pot being below the sole of the oven—the door being above and there being a separate door? A. Yes.

Further on in his evidence he says, “the difference as to the door is that it is on the level with the furnace bars \* \* Q. But the main advantage is being a little higher than the furnace and then the coal won’t fall out. Is that the main advantage? A. Yes.”

Another witness: Carlyle says: “If you have a door on a level with the furnace it would still allow the draught to go on; when you open that door the draught would take more effect on the fire if you put it (the fuel) than if you put it in on the top.”

It was shewn that there was no novelty whatever in a separate door for the furnace. As to the grate the learned Judge found that the sunk grate was in use before. He adds that it never was combined with the separate door to feed it. My Brother Patterson points out that the evidence of Kennedy was overlooked on this point.

We thus find that the whole thing is apparently reduced to the position of this door. If it had been built below or on a level with the grate there would be no infringement. As it has been placed some inches higher it is insisted the plaintiff’s right is infringed.

It is quite possible that plaintiff’s oven with all these improvements may be, on the whole, the best oven that the witnesses have ever seen. What we have to consider is whether the defendant is liable for any infringement of this first claim, as decreed. Plaintiff says this is a “combination.” There is a furnace (not patented as novel.) There is a feed door, not novel in itself. By the door being placed some inches above the furnace the fuel does not fall out in front, as it did sometimes before when the door was on the level or below; and (2) if on the level with the furnace when opened, the draught of air has more effect

on the fire then than when the door is placed above the furnace.

As to the first, it seems to me difficult to argue seriously that a change in the position or level of the door making the fuel not liable to fall out of the grate when the door is opened, can be a patentable matter.

As to the second, the draught of air is lessened or done away with. This is effected merely by the change of position. I cannot see how either or both of these alleged results can be considered a patentable combination.

What is a patentable combination? The subject has been very fully discussed, especially in the American Courts.

*Curtis on Patent Law*, 4th ed. sec. 111 (c), ch. 3, p. 123: "A mere aggregation of parts whereof the patentee has not the exclusive right to either, and in which the parts have no new operation, and produce no result which is due to the combination itself, is not invention, and consequently is not patentable. The combination must be new itself, and must produce a new and useful result, not due to the separate action of any one of the devices used in combination, nor attained thereby, but due to the co-operation or reciprocal action of the combined devices."

*Hailes v. Van Wormer*, 20 Wall. U. S. Sup. Ct. 353, is very full and clear on this head. It is thus summed up in *Walker on Patents* (1883) p. 24: "In *Hailes v. Van Wormer* the patents passed upon covered certain self-feeding coal stoves. These stoves were better than any that preceded them because they contained more good things than were ever before assembled in that kind of heater. All of the things so assembled were old. The superiority of the patented stoves arose from the fact that sundry good features, theretofore scattered through several, were in them gathered into one such article of manufacture. The things so united did not, however, perform any joint function, but each did only what it had formerly done in former stoves. The Supreme Court held the whole to be a mere aggregation of devices, and not to be an invention."

This language seems to me to be singularly applicable to the plaintiff's oven, which, as I have already said, seems to be, on the evidence, the best style of oven, as a whole, in use.

In *Bump*, 2nd Ed., 103-4, the cases are fully stated: "In order to render a combination patentable the results must be a product of the combination and not a mere aggregate of several results, each the complete product of one of the combined elements. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention."

The very simple case of the useful article formed by a piece of soft rubber united to one end of a lead pencil, illustrates the principle. *Reckendorfer v. Faber*, 92 U. S. 357; *Walker*, p. 24. Millions of these had been sold. The Supreme Court called attention to the fact that there was no joint operation performed by the pencil and the rubber, and held the patent to be void for want of invention.

*Pickering v. McCullough*, 104 U. S. 310, commented on by Mr. Justice Henry in *Smith v. Goldie*, in the Supreme Court, is also in point. The cases are very fully noticed in this judgment.

I refer to the instructive language of Bradley, J., in *Atlantic Works v. Bradley*, 107 U. S. 199; *Walker*, 19. "To grant to a single party a monopoly of every slight advance made except where the exercise of invention somewhat above ordinary mechanical engineering skill is distinctly shewn, is unjust in principle and injurious in its consequences." See also *Vinton v. Hamilton*, 104 U. S. 491.

*Bump*, at p. 56 says: "A mere change of form is not patentable, because it involves no invention. It is simply the device of a mechanic \* \* A structural change of form and proportion, although it improves the operation without changing the mode of operation and produces a better result, but of the same kind, is not patentable. If the



change in form and location involves a functional difference, beyond mere mechanical perfection and adjustment, and produces an improved product, it is patentable. \* \* (p. 58.) The mere change of the location of the parts of a mechanism, so long as no different or additional function is performed, does not make the mechanism patentable as to combination. See *Cannington v. Nuttal*, L. R. 5 H. L. 205; *Lister v. Leather*, 8 E. & Bl. 1004; *Clarke v. Adie*, L. R. 10 Chy. 667. See also the judgment of Wood, V. C., in *Curtis v. Platt*, in notes to *Clarke v. Adie*, 3 Ch. D. 134; *Higgins' Digest* (1875) title Combination, p. 16; *Harrison v. Anderston Foundry Co.*, L. R. 1 App. Cas. 574.

When the feed door is placed above the fire box, what contribution does the former make to the combination? Its alleged merit is wholly negative. Fuel does not fall out of the grate bars—the draught of external air does not (as before) affect the fire. A feed door has to be used. Its previous position was disadvantageous as to fuel falling out and draft affecting the fire; it is moved to another position in reference to the fire pot, and neither of these disadvantages are experienced.

How the plaintiff, or any one else, could claim a monopoly of the right to place it above the fire pot or in any other part of the oven is wholly beyond my comprehension, and I must hold that no such right can be legally claimed. The whole case is narrowed down to the right to have this door in this position. Every thing else has to be abandoned.

In the view I take it is not necessary to discuss the other points of the case. The plaintiff claimed five different combinations and only succeeded on the first in the Court below. Nor is it necessary to discuss the finality of the Minister of Agriculture's re-issue of the patent referring back to the issue of the first patent, as was questioned in argument.

I think the plaintiff fails on the merits, and that the appeal should be allowed.



BURTON, J. A.—I have had the advantages of hearing two arguments in this case, and have been unable to rid myself of the doubts which I from the first felt as to this being a combination, as that term is used in reference to patents.

If the claim were for any one of the several subject matters mentioned in the patent it would fail, because all of them are well known appliances long in use before the plaintiff's application.

There is nothing new in a fire pot or furnace placed within a baker's oven below the sole thereof, nor does it appear that there was anything novel in having a second door to an oven; nor to place that second door in any position.

I fancy it is not disputed that a mere aggregation of parts—to neither of which the patentee has the exclusive right—and in which the parts have no new operation and produce no new result which is due to the combination itself, is not invention, and is consequently not patentable.

What is the new principle involved in what is here called a combination? It is no doubt a very great advantage to have a fire continuously burning during the operation of baking, and to be able to supply the grate with coal without opening the oven door, but I fail to see how the use of these two improvements in the same oven, although each contributing to the result of a continuous heating, each however operating independently of the other, can in any way be treated as a combination. It seems to me that it is but the exercise of judgment in the choice of the parts, and not invention in discovering new means to produce useful or better results.

This view is illustrated in one of the American cases in this way: One mode of securing the tire to the felloes of a wheel, or the felloes to the spokes, may be better than any other in use. One form of axle box, or the mode of securing the axle box to the hub, may also be better than any other in use, and it might so happen that both or all had never been used together in the construction of a carriage

wheel; and yet, both or all being old, one who should adopt both or all in the construction of a carriage wheel, without other changes in its construction, would not be an inventor, and his wheel would have no patentable quality. Each device is complete in itself, it performs the same functions in the same way in whatever wheel it is used, and without being influenced or affected by the other.

In that particular case the patent was held good, but upon the ground that it was distinguishable from a mere aggregation of devices in this, that there was a reciprocal action or operation of the parts upon each other, and conjointly upon the entire wheel, each part giving to the other increased support and efficiency, and the two co-operating to make a stronger and more durable wheel than is produced by either without the other.

The case of *Hailes v. Van Wormer*, 7 Blatch. 443, is to the same effect.

That case was for an infringement of a patent for an improvement in stoves, and I make a short extract from the judgment (p. 452), as stating very tersely what I have endeavoured to express.

"The mere addition of an old device producing a specific result to another old device producing its own result in such wise that their combination produces these same two results and no other, is not invention.

For illustration, suppose the use of a fire pot constructed of fire brick or like indestructible material were common in stoves having a direct draught only, its use being valuable because of its indestructibility, and hence its economy; and suppose also stoves constructed with revertible flues were in like common use, the revertible flues around and under the base of the stove effecting as results a more perfect combustion, and warming the lower part of the stove by the passage of the heated products of combustion around or beneath it, and so warming the air in the room near the floor; adding or combining the fire pot of fire brick to or with the stove having revertible flues would not be invention, no other results being thereby produced.

The fire pot of fire brick would still produce its appropriate and original result, viz.: it would be a more economical fire pot, and the revertible flues would still produce their appropriate and original results, viz.: more perfect combustion and the warming of the base of the stove and the air near the floor; but neither result would be due to the combination, nor would any result be produced that either separately did not produce. On the other hand, if the combination itself produces a new and useful result not due to the separate action of either, nor attained thereby, but due to the co-operative or reciprocal action of the combined devices, a totally different question arises, for obviously invention generally (as distinguished from discovery) consists in new modes of employing what was before known so as to produce thereby effects either not produced before, or not produced in that manner, or not produced so usefully."

Upon these grounds I consider that this was not properly the subject of a patent, and I have not thought it necessary therefore to consider the effect of section 19, although the effect attributed to that section might work very great injustice in many cases; but upon the ground that the subject sought to be patented here was not patentable I think the appeal should be allowed, and the plaintiff's bill dismissed, with costs.

PATTERSON, J.A.—The plaintiff complains that the defendant has infringed a patent issued or re-issued to the plaintiff under section 19 of the Patent Act of 1872, on 26th August, 1880.

The original patent bore date 22nd November, 1879 and was for an invention described as follows: "It consists in combination with a baker's oven of a furnace D set within the oven, but below the sole A." In the specification it was said: "The object of the invention is to economise fuel, and allow the fire to be kept in the oven during the whole process of baking, and it consists in placing a fire pot within the oven, but below the sole. Separate

doors and dampers are provided for the fire pot, and it is so arranged that it can be fed with coal during the process of baking."

The invention and its merits are then set forth with more detail, thus :

" In the drawing A is the sole of the oven ; B its door, and C the raising oven, in none of these do I claim anything peculiar ; but instead of making the fire on the sole A as is customary, I construct a fire-pot or furnace D within the oven, the grate E being below the level of the sole A. The fuel is fed through the door E, which can be made in any usual way ; G is a cinder grate, either perforated as shown, or in any other form thought most desirable ; an ash pit H completes the furnace. The flues in the oven are of the usual kind, but in addition to them I make a special flue beneath the grate E, which is connected with the main flue of the oven in any suitable manner ; this flue has naturally a tendency to check the fire, and may be provided with dampers similar to those placed in the other flues. As is well known to those familiar with bakers' ovens, a fire is made in the sole, and when the required temperature is obtained it is withdrawn and the bread or other article to be baked inserted.

It will at once be seen that a general waste of fuel is thus caused, besides the lowering of the temperature every time the door B is opened, and the consumption of fuel required to raise the temperature after each baking. By the adoption of my furnace it is possible to obtain the full benefit from the fuel, which need not be withdrawn or disturbed till thoroughly consumed ; the temperature in the oven can also be regulated by making the fire in the furnace D to suit."

And then comes the formal announcement of what is claimed as the invention :

" What I claim as my invention is : In combination with a baker's oven a furnace D set within the oven, but below the sole A, substantially as and for the purpose specified."

It will be observed that the only peculiarities either in structure or position claimed for this furnace is that its grate is to be below the sole of the oven, and that it is not to be fed through the oven door, but is to have a separate



door. The position of the door with reference to the level of the grate is not alluded to in the specification, although the drawing represented it as above the sole of the oven.

This first patent could not have been supported, because of want of novelty. Mr. Christie, who was one of the principal witnesses for the plaintiff upon the question of the merits of the invention, says it was not a novelty to have a second door to an oven. He describes an ordinary furnace oven as being constructed in that way, but as having the bars of its grate on a level with the sole of the oven. Other witnesses shew that it was not unusual to construct the grate on which the coal was burned below the sole of the oven. Mr. Coleman had one four inches below the sole in 1873, with an ash pot below the grate, but without the separate door for putting in coal. Ireson, the bricklayer, speaks of his practice being to place the grate at a lower level than the sole of the oven. Mr. Curreston, a baker, saw ovens in New York with the grate sunk before the plaintiff's invention, and he speaks of others in Toronto, but none of these had the separate door. Mr. Kennedy, a builder, however, deposes that many years ago he built ovens of the kind, and he mentions one built fourteen or fifteen years ago for Dodgson & Shields, with the ash-pot door, and the furnace door above it, and with the grate of the furnace three or four inches below the sole of the oven, and with the door on the same level as the bars. This evidence respecting the oven built for Dodgson & Shields seems, for the moment, to have escaped the attention of the learned Judge in the Court below, when he remarked (28 Gr. 496) that the sunk grate, though it had been in use before the plaintiff's invention, had never been combined with a separate door to feed it.

The principle of constructing an oven with the furnace grate lower than the sole of the oven, and with a feed door separate from the oven door, was undoubtedly an improvement on the mode of heating with a fire upon the sole of the oven, and using the oven door for putting in the fuel and removing the ashes and unconsumed portions. It was



useful, but, in the plaintiff's case, was not novel. The great utility of his invention, as described in the re-issued patent, seems to depend upon the placing of the feed door higher than the fire pot. That is the feature chiefly dwelt upon by Mr. Christie, Mr. Lawson, and other bakers who were examined at the hearing, and it is not in any way alluded to in the original specifications.

New specifications were prepared, which bear date 14th August, 1880. They contain no allusion to the former ones, but read in all respects as if describing a new invention. I shall read them at length :—

*“ To all whom it may concern :*

*“ Be it known that I, Thomas Hunter, of the City of Toronto, in the County of York, in the Province of Ontario, Canada, builder, have invented certain new and useful improvements in bakers' ovens ; and I do hereby declare that the following is a full, clear, and exact description of the same.*

*“ The object of the invention is to build a baker's oven capable of being fed with fuel when in use, and in which the fire can be examined and the temperature of the oven regulated during the process of baking ; and it consists in placing a fire pot within the oven, its grate being below the sole or hearth of the oven, and its door above the level of the grate, suitable flues being provided as hereafter explained.*

Figure 1 is a sectional plan through A B.

“ 2 “ “ elevation through C D.

“ 3 “ front view partially in section.

In the drawing like letters indicate corresponding parts in each figure. A is the sole of the oven, B the grate of the fire-pot or furnace, C is the door of the furnace placed above the grate B. It will be found preferable to bevel the brick-work leading from the furnace door C to the furnace, as the coal will be more readily fed down the inclined guide, D, besides affording a clear view of the fire from the door.

“ With the view of carrying away the dust and light ashes from the furnace, I make a flue H, leading from below the grate B into the flue E and thence to the vertical flue G. Besides acting as an escape pipe for the dust

and light ashes falling from the grate B. This flue H, when its damper is open, produces a downward draft, checking the fire, and at the same time holding down the dust and light ashes which might otherwise be distributed over the sole of the oven.

“My improvements relate to that class of bakers’ oven in which the baking is effected by radiation from the bricks forming the oven, and which have been previously heated by a fire built on the sole, but withdrawn through the oven door before the dough is put in. In my improved oven the fire is made on the grate B, which is situated as described, and provided with a door placed above as shewn. When the oven is heated ready for baking, the dough is put in the usual way through the door I, and the dampers of the flues are closed to retain the moisture thrown off by the bread during the process of baking.

“The fire remains on the grate B, and can be replenished through the door C at any time, to prevent the oven falling below the requisite temperature. On reference to the drawing, it will be noticed that the grate B is the same in construction as the grate used in base-burners, but placed within the oven below the sole A, and arranged so that it can be shaken horizontally and tilted to dump the coal and ashes into the ash-pit without opening the door of the oven or disturbing the baking in any other way. It will be noticed that I placed underneath the grate B a grate K to catch the cinders and separate them from the fine ashes. This auxiliary or cinder sifting grate will be found of great advantage as an economiser of fuel.

“What I claim as my invention is :

“1st. A fire-pot, or furnace placed within a baker’s oven below the sole thereof, and provided with a door situated above the grate substantially as specified.

“2nd. A fire-pot, or furnace, placed within a baker’s oven, provided with a door above the level of the sole of the oven and connected to the said furnace by an inclined guide substantially as specified.

“3rd. In a baker’s oven a flue H, leading from below the grate B to the flue E, substantially as specified.

“4th. A baker’s oven provided with a circular tilting grate, situated below the sole of the oven, and provided with a door substantially as specified.

“5th. In a baker’s oven a cinder grate K, placed beneath the fire grate B, in combination with a flue H, arranged substantially as and for the purpose specified.”

The plaintiff here claims five inventions, or five separate combinations. He complains, as was stated to us by Mr. Cassels upon the argument of this appeal, of the infringement of two of the five, viz., the first and the fourth.

I shall read some extracts from the evidence for the purpose of seeing just what the witnesses say was really done by the defendant.

Donald Ridout, (sworn, examined by *Mr. Cassels* :) Q.—You are a mechanical engineer, and you know this defendant, and you know the premises? A. Yes. Q. You were present when she was examined? A. No. Q. Going to look at her oven, do you recollect the time you went there? A. No. Q. You examined this oven? A. Yes, and I met young Mr. Carrick with Mr. Hunter. Q. What is the nature of that oven? A. I instructed Mr. Hunter to make a diagram of the oven; instead of the door slanting down as in Hunter's, Carrick's is straight; that is the reason why this does not infringe the second claim in Hunter's, he claims some advantages which Carrick has not. Q. Carrick's oven has a fire-pot or furnace placed within a baker's oven and below the sole and provided with a door placed above the grate? A. Yes. Q. That is the first claim; the patent consists of five combinations; you examined that oven with Mr. Carrick? A. Yes. Q. Were they baking with coal? A. Yes.

Thomas Hunter, sworn, (examined by *Mr. Cassels* :) Q. You were with Mr. Ridout on the occasion of the visit to the defendant's shop to see this oven? A. Yes. Q. Will you state now how the defendant's oven is; how it infringes on yours? A. He had this feed-door and also this fire-pot and this loose grate, shaking and tilting grate. Q. Below the sole of the oven? A. Yes. Q. Just exactly as the fourth claim is? A. Yes. Q. And the fire-pot below the sole of the oven? A. Yes. Q. And the door above the grate, the door above the grate? A. Yes. Q. And has he got the circular tilting grate? A. Yes.

Cross-examined—(Dr. McMichael.) \* \* Q. When you went to see Mrs. Carrick's, was it on fire? A. I think the fires were out. Q. You did not see it blazing then? A. No; I think the fires were out at the time. Q. Was it as deep as yours? A. No; the fire-brick is four and a half inches in

depth. Q. And then it is rounded over; when they make the fire they round it over; A. I suppose so, I do not know. Q. So it is the four and a half inches is the br each of the patent?

HIS LORDSHIP.—Is that the depth of their fire-pot?

By Dr. *McMichael*.—Of Mrs. Carrick's. What is the depth of yours? A. From seven to nine.

“FOR THE DEFENCE.

“WILLIAM IRESON, (sworn, examined by Dr. *McMichael*.)  
—“Q. I believe you built this oven for Mrs. Carrick. A. Yes. Q. What is your occupation? A. Builder. Q. When did you take the contract from her? A. On the 14th of May, 1880. Q. And when had you it completed? A. It was finished about the 3rd day of July following. Q. Had you ever built any before that of the same kind? A. Yes. Q. When, and where? A. In January, 1880, I put one of the same kind up for Mr. Frogley, at Yorkville. Q. That was in January, 1880? A. Yes. Q. When did you ever do it before? A. I have been in the habit of building ovens for the last thirty-five years. Q. But such as the pattern you build? A. Well, I consider there was no substantial difference in the ovens that I have been building for the last five or six years back. Q. You seem in this case to have made a depression for the coal in one corner of the oven? A. Yes. Q. How was that made? A. It is a sunken grate, what I call a furnace; the grate is sunk down below the floor of the oven, sunk down probably four inches, as near as I can say. Q. And circular? A. Yes.

“HIS LORDSHIP—Is that what you have been accustomed to build? A. I have been accustomed to building them at all depths.

“By Dr. *McMichael*—I asked him what the depth was of this one, Mrs. Carrick's, and he says about four inches.

“HIS LORDSHIP—As the depth of the fire-pot below the surface? Yes.

\* \* Q. Now, in building this one for Mrs. Carrick, do you remember, or do you know now the character of the door that was put there? A. It is a slide door. Q. But it has a door on the side where the circular grate is? A. Yes, just opposite the grate in the corner of the oven. Q. Is it with a shoot down? A. No it is on a level; Mr.



Frogley's, that I believe is a shoot down. Q. But you did Mrs. Carrick's? A. No, it is on the level higher than the fire-pot, not on a level with the grate you know. Q. On a level with the sole—it feeds through, it runs level with the sole? A. It is a little below the level. Q. How much do you think that is above the sole of the oven? A. I cannot say positively, but I should say it is an inch and a half above. Q. Then the door, is that on a level with that? A. Yes. Q. Then the slide itself, is that sloping? A. No, it is level there. \* \* Q. You had never built any prior to this time any ovens with the door, the fire-pot, below the sole of the oven, and door above? A. I had built one for Mr. Frogley, that was in July of 1879. Q. And this of Mrs. Carrick's was, what time? A. That was in May, 1880.

“EDWIN A. CULLERTON, (sworn, examined by Mr. *Hoskin*.) —“ Q. What is your business? A. I am a baker and confectioner; I have been in defendant's employ five and a half months; I left her 28th March. Q. Did you work with Mr. Anderson? A. Yes. Q. And did you work the oven Mr. Kennedy has referred to? A. Yes. Q. And did you work the oven that is in question in this suit? A. I did. Q. And what kind of oven are you working now? A. A Hunter oven, supposed to be. Q. Now, what is the difference between Anderson's and Mrs. Carrick's? A. Well, there is considerable difference; one is, the door for putting in the fuel on an inclined position, and the other one is straight; one is about ten and a half inches by nine, while the other is twelve by sixteen. Q. Which has the inclined 'shoot'? A. Anderson's. Q. And how is Mrs. Carrick's? A. Level. Q. Has Anderson's a feeding door? A. Yes. Q. How is that in reference to the sole? A. It is twelve or fifteen inches above the sole. Q. And how is Carrick's? A. It is on a level with the sole of the feed hole. Q. Anything else in which Anderson's and Mrs. Carrick's are alike? A. Mr. Anderson's has four small draughts at the back, while Mrs. Carrick's has only one. Q. What is the difference between Mrs. Carrick's and Hunter's? A. Mr. Hunter's grate is smaller in diameter than Mrs. Carrick's and some seven to nine inches below the sole, while hers is only four; their feeding door is above the bottom, while hers is level with the bottom. Q. What about the size of the feeding doors? A. One is ten and a half by nine inches, while the other is twelve by sixteen.

“HIS LORDSHIP.—Which is the larger? A. Mrs. Carrick's.



By Mr. *Hoskin*.—What is the difference between the situation in reference to the sole of the oven? A. Hunter's is twelve to fifteen inches above the sole, and Mrs. Carrick's is placed an inch to an inch and a half above the sole. Q. Which uses the most coal, Carrick's or Mr. Hunter's? A. I believe Carrick's uses the most coal; it would depend on who was using it, how he coaled it.

By Mr. *Cassels*.—We will mark that; Mrs. Carrick's is not a "shoot," it goes in straight and drops down, and that is higher than the sole, a separate door above, and has a pot. A. If you call a construction with a few bricks placed in mortar, if you call that a pot, that is a pot. Q. You worked at Anderson's? A. Yes. Q. When was that? A. From May till November. Q. Anderson's is an exact imitation of Hunter's? A. It is not an exact imitation of the one I am working at present. Q. But in dimensions? A. Well, it is different from that; it has a circular tilting grate eight or nine inches below the sole, and has a draught in it."

Thus it appears that the defendant began in May, 1880, to build an oven which was finished in the following July, and that that oven had a fire pot lower than the sole of the oven, with a tilting grate, and with a feed door higher than the sole of the oven and therefore higher than the fire pot.

When the oven was built and was first used, the plaintiff's original patent was in existence. The specifications on which the new patent was obtained bear date a month later than the completion and first use of the oven.

The only invention claimed under the first patent was, as we have seen, a furnace set within a baker's oven, but below the sole of it, with a door, separate from the oven door, through which the fuel was to be fed, and which door, it was expressly said, could be made in any usual way, which probably meant either hinged or sliding; and this invention, as we have also seen, wanted the merit of novelty. Therefore the plaintiff could not, under that patent, have prevented the defendant from making or using the oven.

But the plaintiff contends that the further use of the oven, or of the heating apparatus constructed in connection

with it, became unlawful, unless by his consent, after the issue of the new patent on 26th August, 1880.

The contention rests upon the 19th section of the Patent Act of 1872, 35 Vict. cap. 26, which declares that whenever any patent shall be deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the commissioner may, upon the surrender of such patent and the payment of the further fee provided, cause a new patent, in accordance with an amended description and specification to be made by such patentee, to be issued to him for the same invention for any part or the whole of the then unexpired residue of the period for which the original patent was or might have been granted; and that the new patent and the amended description and specification shall have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if the same had been originally filed in such corrected form before the issue of the original patent.

This clause seems to have been suggested by a section of the Patent Law of the United States, which may be found at p. 107 of *Bump on Patents*, and which is section 4916 of the United States Revised Statutes. Our section follows in a general way the language and the provisions of the American model, but it does not closely follow either the enactments or the language. Cases may arise for adjudication in which it will be important to keep in view the differences between the two statutes; but as far as they touch the immediate subject before us, viz: the effect of the re-issue of a patent upon *corrected* specifications, as they are styled in the United States statute, or *amended* or *corrected* ones as they are indifferently styled in ours, we may for our present purpose regard them as covering the same ground; and I agree with the learned Judge, whose decision we are considering, that we should

treat the judgments in the United States Courts, in which the effect of their statute has been declared, as laying down the rule which we should follow.

Some of those cases are collected at page 188 of Mr. *Bump's* treatise. It will be sufficient to refer to *Stimpson v. Westchester R. R. Co.*, 4 Howard, 380, which was decided in 1846 in the Supreme Court of the United States, in which the defendants were held liable for infringing a patent by continuing to use, after the re-issue of the patent, an invention which they had begun to use after the grant of the original patent but before the re-issue, and which would not have been protected by the original patent. The invention there in question was a kind of rail which enabled railway cars to turn on the arc of a circle with a short radius.

Now reverting to the plaintiff's claim No. 1, viz.: a fire pot or furnace, placed within a baker's oven, below the sole thereof, and provided with a door situated above the grate: we have a description of just what the defendant has in use.

The essential part of the description, because the novel feature, is the situation of the door *above the sole of the oven*, and this is found only in the new patent and in the amended description or specifications.

We are given to understand that, except in the letters denoting the different objects, the drawings which accompanied the original specifications were the same as those with the new specifications, and that the position of the door above the sole of the oven was indicated alike in both sets of drawings. There is other evidence that it was part of the plaintiff's original invention, although not specifically described in his original specifications. That evidence is found in what is told us in connection with Mr. Anderson's oven, which was built after the plan of some of those built by the plaintiff, as well as from the general tenor of the evidence, including that which relates to the defendant's own oven. Indeed there is reason to believe, though it cannot be said to be directly proved, that Ireson, the

bricklayer, who had built many ovens before, but never had made his furnace door higher than the bars, obtained the idea which he carried out in the defendant's oven from the plaintiff's specifications and drawings which he had. He says he took care not to infringe the plaintiff's patent; and the defendant's son, who procured the specifications, says he told him not to infringe; and, as we have seen, the construction of the oven, while only the original patent existed, was not an infringement. The complaint is only for using it after the issue of the new patent.

There were thus ample grounds for holding, as was held in the Court below, that with regard to the particulars I have discussed the new patent was for the same invention as the first one, and came therefore within the 19th section of the statute. I speak of this as affirmatively shewn by the evidence before us, without relying upon the re-issue of the patent as implying an adjudication of the same question by the Minister of Agriculture or his deputy; and I prefer so to do, because I do not care to form an opinion, till it becomes necessary, as to how far the action of the Commissioner of Patents, under our law, may be analogous to that of the Commissioner of Patents under the United States system.

Under the effect of section 19, I think we are bound to hold that the defendant is infringing the plaintiff's patent by the use of his invention No. 1, and therefore to affirm the judgment, if the invention is one which can support the patent.

No. 4 is either covered by No. 1, or is bad for several reasons.

No. 1 claimed any grate, if lower than the sole of the oven. No. 4 is confined to a tilting grate in that position, and in that view it is covered by No. 1.

If No. 1 cannot be sustained when the grate is fixed, the tilting of the grate will not help it. There is no pretence of novelty in the use of a tilting grate; the plaintiff himself avows that it is simply the well known grate used in various stoves. The effective contrivance for the purpose of



heating ovens on the improved principle is that of the raised door in connection with the sunken fire-pot. The tilting of the grate does not help the heating, it merely enables one to empty the fire-pot more easily. I think, therefore that No. 4 may be put aside for the two reasons: because all that is important in it is covered by No. 1, and because, if not so covered, the tilting grate, which is the only point of difference, does not, either by itself or by its combination with the other things, constitute a patentable invention. *Clark v. Adie*, L. R. 10 Ch. 667, and other cases are against the plaintiff upon this claim.

I see no reason to question the opinion expressed in the Court below respecting claims Nos. 2, 3 and 5, but nothing turns at present on their validity, and therefore I do not discuss them.

After the first argument of this appeal I gave the case a good deal of consideration, and arrived at the conclusions I have so far expressed; and the objections to the patentable character of claim No. 1 did not then strike me as having much force. The utility of the invention seemed to be amply sustained by the testimony of bakers who spoke from actual experience of its superiority over other modes of heating ovens.

Granted that a separate door from the ordinary oven door had previously been in use for feeding with coals a fire pot sunk below the sole of the oven, that use of the door, which was always on a level either with the bars of the grate, or, at the highest, with the sole of the oven, left much to be accomplished in the way of effective and convenient, and even economical heating, which was not attained until the plaintiff hit upon the device of constructing the oven with the door at a higher level. It appeared to me that we might apply to it the test of novelty suggested by Lord Chelmsford in *Penn v. Bibby*, L. R. 2 Ch. at p. 136, viz: whether the new application, lay so much out of the track of the former use, as not naturally to suggest itself to a person turning his mind to the subject; and that tried by this test, the invention had



the requisite of novelty as well as that of utility. The fact which seemed to be satisfactorily established, that practical bakers, acquainted with the working of their own ovens and those of other people, including the kind called furnace ovens, while improvements in the direction in question were aimed at, had gone on using and having built oven after oven without ever thinking of this particular arrangement of the feed door, though ready to acknowledge its value when effected by the plaintiff, struck me as proving this particular issue.

Finding, however, that my learned brethren are not of that opinion, I naturally doubt its correctness.

I have re-considered the subject without being able to see so clearly that my former opinion was wrong as to enable me to concur in reversing the judgment of the Court below.

I have always felt that much difficulty has been created by the way the specifications and claims are drawn, including as they do a number of things for which no novelty can possibly be claimed. It may not be quite clear that claim No. 1 ought to be considered separately from the rest. It is only by so treating it that an argument in its favour can be plausibly urged. I think, however, that, having regard to section 25 of the Patent Act of 1872, as well as to the separation in form of the five claims specified, each may be taken by itself.

These claims are not described in the specification as combinations, that is to say the word combination is not employed. I do not mean to say that the use or the absence of that term is conclusive. In the specifications which were in question in *Yates v. Great Western R.W. Co.*, 2 A. R. 226, 242, the word "combination" was used where in my opinion nothing more than "contact" was intended, and there can be no doubt that a combination may be described without using that word. The fact, however, is, that the word is not used here, and I do not think we are driven to hold that a combination is claimed. The claim is for a fire pot placed within a baker's oven, below

the sole thereof, provided with a door situated above the grate substantially as specified. The door in the particular position, which was the invention, is only claimed when provided for use with the sunken grate. It is not asserted in the specifications or in the evidence that it is a valuable invention except in connection with a grate of that description; but when used with that grate it constitutes the "new and useful improvement in bakers' ovens," which the plaintiff claims to have invented. I am not prepared to hold that the criterion of combined action producing some result, is not satisfied by the attainment of more regular and steady heating by the use of this door in combination with the sunken grate, than was attained by the door on the level, which could not be opened without allowing coals to fall out, and which did not afford as good facilities for examining, regulating, and feeding the fire while the baking was going on; but I do not think it necessary to regard the claim as one for a combination in the technical sense of that term.

I quote from *Terrell* on Patents, p. 49, the definition, which has become somewhat trite, of a patentable invention:

"It will always be a question for the jury whether the invention is useful, that is, whether that which is new is a sufficient advance or improvement upon what was already known by the public as to add to a material extent to the public stock of knowledge. It does not mean that there must necessarily be a great deal of invention, or an extensive operation, to support a patent, but that the invention, when carried out, in some way materially improves the process of manufacture, either by cheapening the article produced, or by improving its quality, or by improving the method of producing, or the uses to which it can be put."

It was held more than a century ago that an addition to an existing machine was the subject of a patent: *Morris v. Branson*, Bull. N. P. 76; *Goodeve's Patent Cases*, 311.

I think there is a palpable difference between the combination of two old devices to form a new machine, and the addition to an existing machine of a newly invented device or improvement.

Some of the cases frequently cited on questions respecting patents were discussed in the judgments delivered in this Court in *Yates v. Great Western R. W. Co.*, 2 A. R. 226, and *Smith v. Goldie*.

I have now read a good many more, particularly the more recent English cases, with the aid of *Goodeve's* very useful abstract, and the references in *Terrell on Patents*; but I cannot help feeling that it is as unsatisfactory to look for direct aid in deciding a patent case by citing decisions addressed to the facts of another patent case, as it is to attempt to construe an ambiguous will by the aid of the judgment formed by another mind concerning another ambiguous will. Cases may be found to illustrate particular points; thus such a case as *Hinks v. Safety Lighting Co.*, 4 Ch. D. 407, where the substitution of a flat wick in a coal oil lamp, which made it burn successfully, in place of a round wick, which was a failure, was held patentable; or the case of *Dangerfield v. Jones*, 13 L. T. N. S. 142 in which Lord Hatherley sustained a patent for a mode of bending handles of walking sticks by the use of heat, although wood had for a long time been bent by coach-makers and others by the application of heat; or the much older case of *Lewis v. Davis*, 3 C. & P. 502, where a patent for a rotary cutter to shear cloth from list to list was held good by Lord Tenterden and by the Court *in banc*, notwithstanding that a rotary cutter had been in use to shear cloth from end to end—may be referred to as examples of the apparent ease with which the demand for invention has sometimes been satisfied. And cases might be collected in illustration of the observation made by Tindal, C. J., in *Crane v. Price*, 4 M. & G. 580, that if an invention be new and useful to the public, it is not material whether it be the result of long experiments and profound research, or whether by some sudden or lucky

thought or mere accident of discovery ; but in every case, the real question is, how to apply to the facts presented the general principles concerning which there is little or no difference of opinion.

It is possible that if we were trying this action as a Court of first instance, and I found my opinion at variance with that of the other members of the Court, I might, in view of the peculiar character of the specifications which, by claiming a number of things which were not new, tended to invite difference of opinion, be content to express my doubts without dissenting from the judgment of the Court ; but, as my own view agrees with that of the learned Judge whose decision we are considering, I think it my duty to state my opinion that the appeal ought to be dismissed.

OSLER, J. A.—The plaintiff's first patent and accompanying specifications in terms embraced only the combination of a baker's oven, with a furnace set within the oven, but below the sole.

The drawings referred to in the specification do, however, indicate that the furnace was intended to have a separate door situated above the grate of the furnace, and therefore above the level of the sole ; and I agree with my Brother Proudfoot that the combination in the re-issue of August, 1880, is one which would be protected under section 19 of the Patent Act of 1872, the original patent being as to that, inoperative and void merely by reason of insufficient description or specification.

In the re-issue the plaintiff claims as his invention five separate combinations, that is to say, as expressed in the patent itself, and as the plaintiff said in his evidence, for the five combinations separately and not a combination of all the five together.

The re-issue has been maintained in the judgment appealed from as to the first combination as being properly the subject of a re-issue ; but not as to the other four, on the ground that the latter had been in public use with the consent or allowance of the plaintiff for more than a year



previous to the application for the re-issue, which therefore, as to them could not be treated as an original patent.

Whether in any case the re-issue could have been treated as an original patent for what was claimed as, but could not properly be, the subject of a re-issue under the 19th section, may be doubted, but it is not necessary to decide that point, and apart from any other objection some of these other combinations, such as the fourth and fifth, seem to be entirely wanting in the element of novelty.

What we have, therefore, as the first combination in the re-issue is a firepot or furnace placed within a baker's oven *below* the sole thereof, and provided with a door situate below the grate. I think it sufficiently appears from the evidence of Kennedy and Coleman, and others, that there was no novelty in having the fire pot or furnace below the sole of the oven with a grate below and a separate furnace door.

In this particular combination, therefore, the only novelty consists in placing the furnace door above the grate, in other words, higher than the sole of the oven. The position of the furnace door alone cannot be the subject of a patent, and the question is, whether it is capable of being so in combination with the fire pot below the sole. I think the evidence shews that it is not; and that the invention claimed, instead of being a combination properly so called, each part of which contributes something to a joint or common function, is a mere aggregation of the two devices of the sunken fire pot, and the door above the grate.

The result of this aggregation, with others, for which the patent is not maintainable, is a better oven. The sunken fire pot contributes its own advantages in confining the fire to one locality, enabling it to be kept up to some extent during the process of baking, and producing a more continuous and evenly distributed heat, while the raised door contributes the more ready retention of the coal and the convenience of examining the fire. Each device works in its own way, and the combined result is a good oven. But there is an absence of what, Mathew, J., in *Pickering v.*



*McCullough*, 104 U. S. 310, calls "A joint and co-operative action of the several elements of the combination producing that result." The language of Strong, J., in *Hailes v. Van Wormer*, 20 Wall. at 368, seems very apposite. "Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and then allowing each to work its own effect without the production of something novel, is not invention."

I think the patent cannot be supported, and that the appeal should be allowed.

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### ADAMSON V. YEAGER.

#### *Principal agent—Commission on sale—Limitation of agency.*

The defendant at the instance of the plaintiff, placed his, the defendant's, farm in his hands for sale, subject to the payment of a certain commission in case the farm should be disposed of through him, and if the defendant himself sold without the aid of the plaintiff, the commission should be only one-half. The defendant alleged that it was a term of the arrangement that if the land remained unsold at the end of two years the agreement should cease.

*Held*, that if parolevidence as to the limitation of time; was not admissible, the law would infer its continuance for a reasonable time only; and that in deciding what was a reasonable time the time spoken of by the parties which was two years, might be considered.

*Per* BURTON and PATTERSON, JJ. A., such parol evidence was admissible. *Held*, also, that the defendant having refused to sell to a proposed purchaser found by the plaintiff, the plaintiff was not entitled to recover his full commission as on a sale, but the value of his services as on a *quantum meruit* or damages for the defendant's wrongful refusal.

THIS was an action in the County Court of Oxford, by James R. Adamson, who carried on business, under the name of Adamson & Co., in the city of Hamilton, as a land agent, against Lewis Yeager, a farmer residing in the township of Burford.

The action was brought to recover the sum of \$200, alleged to be due by the defendant to the plaintiff for

services rendered in endeavouring to sell, and ultimately obtaining a purchaser for the farm of 150 acres owned by the defendant, in Burford, but which sale it was alleged the defendant refused to carry out.

The trial came on before McQueen, Co. J., without a jury, on the 14th of June, 1884, when the examination of the defendant, taken before the trial, was read, in which he swore \* \*

"I reside in Burford, and am the owner of the east three-quarters of lot No. 23 in the 11th concession of that township. I placed this land in the hands of plaintiff for sale four years ago last February. I gave it to him to sell as he was a land agent. Swayze, who resides near me, came to me to get me to place it in his (plaintiff's) hands several times. Swayze, came two or three times to my place, and he and some other man named Cochrane came to see me at a neighbour's. The first time he came he asked me to give it to the plaintiff to sell. A short time after he came again, and I then gave him no satisfaction. He came a third time and saw me in the woods. Cochrane was with him then. A man named Palmer was also present. He said if I went in he would also. We then all went to Palmer's house, and Cochrane took the particulars of my place, the size of the buildings, &c. I then told him the price I would sell it for and the terms of payment and length of time they had to sell in. He (Cochrane) did the writing, which I signed my name to. I did not see the form. He had a printed blank, which he filled up from the questions I answered. He did not read the blank form to me. He asked me questions which I answered \* \* He had the blank form before him, and I suppose read from it, but I don't know. He would look at the blank, ask me a question, and then fill in from what I said, and after he got through filling in my answers I signed my name, and he said he would complete filling up the blank form afterwards as I was in a hurry. There were no questions that I know of unanswered, and I don't know what balance of the form he was going to fill out or what balance he referred to. I signed the paper and left then. I do not know if Palmer signed a paper. I was not there if he did, as I left in a hurry. Nothing else occurred that I remember at this time. I did not withdraw the property from their hands. I heard that they had got a purchaser for my place when I got served with the writ of summons in this action. I had not heard before this either from the plaintiff or any one else, and I don't even know now who he had arranged to sell to. I would not at the time I got the writ have been willing nor now be willing to take the sum they sold for. After their time for selling expired I greatly improved the place. In the last two years, I have put on 4,000 rails, 1,000 cedar posts in fencing; about 200 of these posts are planted. I have also set out 23 or 24 pear trees and about 30 peach trees, and have done some grafting. I mean "by the time for selling my property" that two years was the limited period for

them to sell in. I do not remember saying anything to any one about my arrangement. About a year ago I talked to Abraham Miller. I told him the time for the plaintiff to sell my place had expired. The rails referred to were put on some the winter before last and some last winter. My reasons for refusing to pay this commission are, that I do not know anything about their selling, and if they sold, the time for their doing so had expired. I am not prepared to-day to take the amount they now say they sold the property for. I signed the paper now produced marked "A." \* \* I did not read the agreement, nor did they (Cochrane or Swayze) read it to me. I had no communication, written or verbal, from plaintiffs or their agents from the time I signed the agreement till the day I was served with the writ. \* \* Cochrane said it was not binding for more than two years. This was the period arranged between Swayze and me. Cochrane did not offer to read it to me. I don't know but all the questions in the agreement were asked me. I now learn for the first time that the two years clause limiting the time for selling is not in the agreement. I would not have signed if I had supposed or known that that clause was not in. Cochrane said the agreement was only binding for two years, and I supposed the limiting clause was in the agreement. I have had no information from the plaintiff further than the pleadings and the writ that they had found a purchaser."

The printed form mentioned in the defendant's examination contained a description of the property; shewing its contents, quantity of clearing, and other particulars, and accompanying the same was a letter, signed by the defendant, as set forth in the judgment of Patterson, J. A., p. 485.\*

On the 30th of June, the learned Judge ordered judgment to be entered against the defendant for the full amount claimed, and costs.

The defendant thereupon moved, before the Judge in term, for an order *nisi* to set that verdict aside, which, on the 9th of July, 1884, was refused.

The defendant then appealed to this Court, and the appeal came on for hearing on the 21st of October, 1884.†

\* The defendant alleged that by the terms of the agreement, and which he thought had been stated in the memorandum signed, after a lapse of two years if the land was not sold he would be at liberty to withdraw the property from the agency of the plaintiff without paying commission, &c.

† *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ. A.

*F. R. Ball*, Q.C., for the appellant. The evidence given at the trial was such as to entitle the defendant to the verdict of the learned Judge who tried the case, as it clearly shews that unless the farm was sold within a period of two years the respondent was not to be entitled to any remuneration; and it is conclusively established by the evidence that was before the Court below that no sale of the farm had been effected or purchaser procured within the time limited. Neither was there any effected until long after the lapse of time stipulated for, and not until after the appellant had effected large, valuable, and permanent improvements on the land, so that if the evidence is believed, and not a word has been alleged against it, the respondent was clearly not entitled to recover from the appellant any remuneration, for it is undoubted from the statements of all the witnesses that the written document or memorandum did not contain the whole agreement; but that there was a collateral agreement between the parties, verbal to be sure but totally distinct and not inconsistent in any degree with the written one. This evidence, it is submitted, should have weighed with the learned Judge at the trial, and was such as should have led him to a different conclusion, and the verdict should have been entered for the appellant—the defendant in the Court below.

*G. T. Blackstock*, for the respondent. The appellant, if I understand him aright, alleges, or attempts to allege, fraud in the obtaining of his signature to the agreement, but this he abandoned before the Judge in the Court below. Then he attempts to set up a mutual mistake, and asks to have the instrument reformed; and lastly, he sets up the existence of a collateral agreement, to the effect that if the land was not sold within two years then that the stipulation as to compensation should be at an end. This of course, should the Court be of opinion that such a collateral agreement was really entered into, would defeat the action; but the evidence adduced, I contend, cannot be said to establish that fact distinctly.



*F. R. Ball*, Q.C., in reply. Under any circumstances, the agreement being silent as to any limitation of time for completion of the service, if any doubt exists as to the fact of a collateral agreement having been made, the Court would say that the service must be performed within a reasonable time; two years must certainly be deemed a reasonable time.

*Walter v. Dexter*, 34 U. C. R. 426; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Harris v. Rickett*, 4 H. & N. 1; *Wallis v. Littell*, 11 C. B. N. S. 369; *Southam v. Southam*, L. R. 17, Eq. 578; *Erskine v. Adeane*, L. R. 8 Chy., 756; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Davis v. Jones*, 17 C. B. 625, were referred to.

November 20, 1884. HAGARTY, C. J. O.—If the plaintiff's contention be sound, the defendant by this writing placed his farm in the plaintiff's hands to sell, reserving to himself the right of withdrawing or selling the farm himself on payment of  $1\frac{1}{4}$  per cent. this on the face of the agreement was to extend to all time. It is difficult to understand any man knowingly binding himself to such a bargain.

After a good deal of hesitation I have come to the conclusion that such a bargain must be considered as only to be for a reasonable and not for an indefinite time.

Any authority given by a principal to an agent to perform an act or service for him, unless the duration of the authority be specially fixed or agreed on is generally revocable at the pleasure of the principal, subject to the agent's right to remuneration for any work, labour, or expenditure fairly bestowed or made by him under the authority up to its revocation.

It is clear that in some shape or other the period of two years was spoken of between the parties, the defendant and his witnesses understanding it to be the absolute limit of the agreement, the plaintiff's agent understanding that after two years "if defendant still wished to sell we would continue to advertise and sell as soon as we could, if we were



not notified; if the company was not notified that they (the lands) were withdrawn."

He had previously sworn, such a sale would be on the same terms as stated in the contract.

I think we can decide this case without trenching on any rule against varying or qualifying a written contract by parol testimony, or without resorting to the doctrines of a cotemporaneous or independent parol agreement not varying the writing.

We can take the agreement as subject to the ordinary rule (in the absence of any special terms to the contrary) of being in force for only a reasonable time. And I do not see why, in considering what would under the circumstances be a reasonable time, we may not listen to what passed between the parties as a help to guide us. I think we may safely find that after the expiration of over three years the defendant might not unfairly consider himself freed from the requirements of the writing.

In any event I think even if plaintiff was entitled to recover anything, the verdict could not stand, as his claim should have been not as absolutely entitled to the full sum as for a sale, but only a *quantum meruit*.

The case was heard and decided apparently without objection as if the plaintiff had fully performed his agreement: *Prickett v. Badger*, 1 C. B. N. S. 305; *Wycott v. Campbell*, 31 U. C. R., 590. I think we should allow the appeal, and that judgment should be entered below for the defendant.

BURTON, J. A.—There is abundance of evidence here to shew that the written memorandum did not contain, and was not intended to contain, the whole agreement between the parties. The writing itself is silent as to the term during which the agreement was to continue in force. No doubt where a contract omits any mention of time the inference is, that a reasonable time was intended, and no evidence would be receivable to vary it, and shew that what was intended was that the time for its performance should be

twelve months, or any other fixed period. The distinction is, that the writing here did not constitute the contract but only a portion of it. The plaintiff's agent applied to the defendant to allow him to undertake the sale of his farm. The conversation may be resorted to for the purpose of shewing what the real contract was, and we then see that the letter was not the contract, but only a portion of it.

I had occasion only recently to consider the question of the reception of parol evidence in the case of *Ellis v. Abel*, ante 266, in which case I was of opinion that the evidence should have been excluded, because it was clear that the letter from the plaintiff to the defendant and his acceptance of it constituted the sole contract of sale between the parties, and the attempt to prove a warranty as part of that written contract of sale by previous verbal representations of the plaintiff's agent was not permissible.

This case is very different, and I have no doubt comes within the principle of *Lockett v. Nicklin*, 2 Ex. 93, and cases of that class.

The case appears, however, to have been contested at the trial on the ground of fraud, which the learned Judge, I think, very properly held was not made out.

There being evidence of an express contract either for two years absolutely, or for two years if terminated by notice at the expiration of that period, and if not then for a further period of two years, terminable in a similar manner, there is no room, in my opinion, for resorting to an implied agreement for a reasonable time.

There was conflicting evidence as to which of these two limitations was adopted, and I suppose we must now conclude that the learned Judge adopted the evidence of Cochrane in preference to the other witnesses, two of whom were directly interested.

One point was not adverted to in the Court below, nor in the argument before us, viz. : that assuming the learned Judge's apparent finding to be correct that the authority had not been revoked at the time when the plaintiff found a purchaser, the action should have been either a special

action for a wrongful withdrawal of authority or on a *quantum meruit*, in which the plaintiff would not necessarily be entitled to the full commission, although in such a case I should think that *primâ facie* that would be the proper measure of damages.

As this point was not raised and might possibly have affected the learned Judge's view of the damages, my view is, that the case should be remitted back to him, and the rule made absolute for a new trial with costs to abide the event, and to that extent the appeal should be allowed.

The learned Judge was better able than we can possibly be to judge of the credibility of the witnesses, and I am not therefore disposed to interfere with his decision on a question of fact and to enter a judgment for the defendant. I think that the case being disembarrassed of any legal difficulty as to the admission of the parol evidence, and the Court below being advised that the damages should be based on a *quantum meruit*, the learned County Court Judge is the proper party finally to dispose of the case.

PATTERSON, J. A.—This is an action brought by the plaintiff in the County Court of the county of Oxford to recover commission from the defendant at the rate of 2½ per cent. for a sale of land, which he alleges he effected for the defendant.

The mode of business adopted by the plaintiff, who is a real estate agent or broker, is, or was in 1880, to procure from persons willing to place property in his hands for sale the particulars required for the information of purchasers, in the form of answers to a series of printed questions, appended to which was a printed retainer or contract to be signed by the employer.

The transaction proposed to the defendant by the plaintiff's agent or canvasser who procured him to employ the plaintiff, and assented to by the defendant, was a sale of the defendant's farm. In the schedule of particulars the price lowest for cash down, is put at \$8,000, or on time \$8,500. There was no idea of disposing of the farm in any

other way, and consequently no directions as to rental, terms of exchange, or anything but absolute sale. Yet it will be noticed that the printed retainer is drawn in terms to authorize exchanging or letting, and the defendant's signature taken to it in that shape. It reads thus :

“ Burford, 4th Feb., 1880.

“ Messrs. Adamson & Co., Hamilton :

“ Dear Sirs,—I herewith hand you particulars of my farm, which I wish you to sell exchange or lease for me, on the terms stated above ; and I hereby agree to pay you two and a half per cent. upon the purchase money when disposed of either directly or indirectly through you, or five per cent upon the first year's rental for leasing, which commission is to cover all expenses of advertising and otherwise. Should you receive an offer less than the above prices, you will please leave it for my acceptance. I retain to myself the right of selling or exchanging or leasing in whole or in part without your assistance, but agree in such case to pay you one-half of the above commission for advertising and otherwise trying to sell exchange or lease for me. Should I desire to withdraw the property from your hands, I can do so at any time by giving you notice in writing to that effect, and paying you one and a quarter per cent. upon the cash price stated above.

Yours truly,

LEWIS YEAGER,  
New Durham, Ont.”

The plaintiff advertised the farm as being in his hands for sale but did not procure an offer to purchase it, or as far as we are told even an inquiry, until fully three years after the date of the retainer. During all that time I do not gather that any communication whatever passed between him and the defendant. The defendant had in the meantime, but not, as I understand the evidence, till after the beginning of the third year, gone to a good deal of expense in improvements, principally by fencing and by planting new fruit trees and grafting old ones, and had in this way added to the value of his farm, and also made some of the particulars which in 1880 he had given to the plaintiff inaccurate descriptions of the new state of things.

The offer which the plaintiff received was from one Chambers, who saw an advertisement in the Globe in February, 1883, and in reply to a letter to the plaintiff inquiring about the matter, was referred to a Mr. Miller of



Norwich for information. Chambers went to see the farm. He saw the defendant at that time, and was told by him that the plaintiff was not then authorized to sell it.

In the following August, Chambers made an offer through the plaintiff of \$8,500 cash, and the defendant refused to sell to him.

The defendant contended then, and contends now, that the authority of the plaintiff to sell had lapsed long before Chambers appeared. I shall discuss that contention, but before doing so I wish to refer to another aspect of the case.

The plaintiff's claim is for commission on \$8,000 at  $2\frac{1}{2}$  per cent. In his statement of claim he sets out the agreement, the offer of Chambers, and the defendant's refusal to sell, and then puts his claim thus :

"8. The plaintiff says that he fulfilled his contract with the defendant in selling the said property on the terms aforesaid, and that he is entitled to be paid by the defendant the full commission of  $2\frac{1}{2}$  per cent. on the said purchase money, and that all conditions were fulfilled, and that all times have elapsed necessary to entitle plaintiff to payment thereof."

"9. The plaintiff claims to be paid \$200 by the defendant for his said commission ; and the costs of this suit."

The learned Judge of the County Court acceded to this contention, and gave judgment for the plaintiff for \$200.

His attention cannot have been called to the terms of the contract, which, assuming it to have remained in force, only entitled plaintiff to commission when the property *was disposed of*. This farm was not disposed of, for the defendant refused to sell. If his refusal was wrongful as between him and the plaintiff, the remedy of the latter would not be by action for the commission, which he could only earn in the terms of the contract : *Topping v. Heely*, 3 F. & F. 325 ; *Read v. Rann*, 10 B. & C. 438 ; *Simpson v. Lamb*, 17 C. B. 603 ; *Boydell v. Snarr*, 6 C. P. 94 ; *Prickett v. Badger*, 1 C. B. N. S. 296 ; *DeBernardy v. Harding*, 8 Ex. 822 ; *Bull v. Price*, 7 Bing. 237.

The damages in an action for refusing to sell, or the



amount to be recovered *quantum meruit*, would not necessarily be governed by the amount of commission stipulated to be paid when the property was disposed of. And one of the circumstances to consider in assessing the amount would be the great delay in procuring the offer, which the defendant not only promptly rejected when it was made in August, 1883, but which he had told Chambers, and through him the plaintiff, in the previous February, the plaintiff was not authorized to take.

But I have formed the opinion that the learned Judge in the Court below was wrong in holding that the authority to sell remained in force.

The defendant asserts, and he is corroborated by the two witnesses, Palmer and Swayze, who were present when he made the bargain with Cochrane the plaintiff's agent, that the retainer was to last only two years. I do not think Cochrane really contradicts this; I shall presently refer to his evidence.

This defence is strenuously objected to on the part of the plaintiff, on the ground that it varies a written contract by adding a term to it by parol evidence.

The rule on the subject is thus stated by Lord Bramwell in *Wake v. Harrop*, 6 H. & N. 768, 775: "A written contract not under seal is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is, that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to shew whether or not the written document is the binding record of the contract."

*Harris v. Rickett*, 4 H. & N. 1, affords an instance of the application of the rule.

The addition to what the paper before us contains of an agreement that the arrangement there set down should continue in force for a definite time only, does not vary the writing and is not inconsistent with anything expressed in it. It merely adds something which is not there.

When we attempt to apply the rule in question, there are two issues of fact to be decided: *First*, was the writing intended to contain the whole agreement? *Secondly*, if not, what further term was agreed upon? We ought, for the sake of distinctness, to keep these issues separate from each other.

We have four witnesses who give direct evidence on the subject. We may begin with the plaintiff's witness, Cochrane, who negotiated the bargain, although he was called to rebut the evidence of the other three.

I shall read his direct examination only:

"*Question.* It has been said here, that the operation of this agreement was limited to two years and to two years only. Is that true? A. No, it is not true exactly. It is true in this respect, that I induced those people, or gave them the announcement that I was taking farms for sale to advertise in the journal of Messrs. Adamson & Co., and if there was no sale there would be nothing to pay, that is, if the farms were not sold in two years.

"HIS HONOR—You said there would be no pay. A. Nothing to pay if the farms were not sold within two years, but if those farms were not sold within two years, if the parties wished they could continue their farms in the advertising journal, and if they didn't wish them continued in the journal, they should give the company notice of their intention to withdraw.

"*Mr. Blackstock*—That is to say, when the time came, at the expiration of the two years, if they wished to withdraw them, they should give the company notice? A. Yes, and if they didn't wish to withdraw the farm, we would go on and advertise it and sell it as soon as we could. Q. On what terms? A. On the same terms as in the contract. Q. Then it is not true that the intention was that this agreement should contain a provision that the agreement should be absolutely at an end? A. No, I never calculated that that should be in, and I don't think I gave anyone to understand that."

The other three witnesses are Swayze, Palmer, and the defendant. They all agree that there was a distinct arrangement respecting the time.

In addition to this direct evidence on the first issue, there is the fact that the document is a printed form, prepared by the plaintiff, and to which the defendant's signature is procured by the plaintiff's agent, without taking so much pains as to strike out of it the words referring to exchanging or letting, which are inapplicable to the intended transaction. It is not a memorandum drawn up after the terms had been discussed and settled. The signature to it is an assent to the terms presented concerning the remuneration which the plaintiff was to have an opportunity of earning; everything else, even the services which the plaintiff was to render, or the efforts he was to make to sell, are left unexpressed, and the plaintiff does not sign it. It would, in my opinion, be taking a wrong view of the evidence, and one which, even if more arguable than it is, the plaintiff who presents the printed document to the farmer for signature has no right to ask a tribunal to take, to hold that it was intended or understood to contain the whole bargain.

We then come to the second issue of fact. What was the agreement as to time?

Mr. Swayze tells us that Mr. Cochrane wished his assistance in his canvass, offering to share his commission with him, and he went with Mr. Cochrane to see the defendant, and met him at Mr. Palmer's farm.

Mr. Swayze's account of the material part of the interview may be shortly stated as being, that Mr. Cochrane told the defendant that he would take the dimensions of their farms (that is defendant's and Palmer's) and advertise it for two years; that if the farm was sold by the firm or company in two years they would charge him two and a half per cent., and that if not sold when the two years were up, the time would expire and it would cost the defendant nothing; and that Palmer in presence of the defendant asked Cochrane how long the agreement would bind him, and was told two years. I do not attempt to follow the details of this evidence through the various phases of direct and cross-examination.

The first interview was in the woods at Mr. Palmer's farm where the defendant happened to be working, and, after talking there, the party of four went to Mr. Palmer's house, where the writing was done.

§ A good deal of the cross-examination of these witnesses took the form of testing their recollection as to whether one statement or another was made in the woods or at the house. This is just the kind of case where it might be questionable, if dishonest fabrication of a story and conspiracy to misrepresent the truth were imputed to the witnesses, whether agreement or discrepancy would be the more significant. There is, however, no foundation in any part of the evidence for reflecting on the veracity of witnesses. Cochrane's evidence came after the cross-examination of the others, and he confirmed them as to the fact that the two years formed a subject of discussion. He bore testimony to the good reputation of Palmer, and Swayze was the man selected by himself to aid him in this very business. Mr. Palmer was, according to his own statement, the active negotiator, the defendant relying upon him and acquiescing in what he said. He tells us that before they entered into any agreement the question was asked how long the agreement was to be binding, and Cochrane said for two years.

The defendant does not differ from the other two except in unimportant details. "They had the selling of the place for two years and only two years," are his words in one place. At another he said "Mr. Cochrane said I could leave it for two or three years if I wished, and I said for two years."

Opposed to these three there is only the evidence of Mr. Cochrane, and I doubt if it can really be said to be opposed to the others. The difference between them is that, as put by Cochrane, the defendant was to do something at the end of two years if he wished to terminate the arrangement, that is he was to intimate his wish to the plaintiff, not by a notice in writing, such as the agreement provided in case he wished to withdraw at any other time, but by any kind of intimation.



The right to stop at the end of the two years was, even as he puts it, to be without payment of anything. In this all four agree, that the plaintiff was to do whatever he did during two years on the chance of earning the full commission in case he disposed of the property, or half the amount if the defendant withdrew it or sold it himself during the two years.

We have no assistance from anything noted by the learned Judge respecting his appreciation of these witnesses. I do not understand him to have assumed to decide the questions of fact which I have been discussing. I understand as well from his silence as from the course of argument before us, that his judgment was based on the opinion that he could not go outside of the written paper. We are therefore a good deal in the position of a jury trying a case upon evidence taken under a commission.

One thing properly to be borne in mind is, that Cochrane, who now gives his evidence in a way that requires some attention to detect wherein it differs in terms from the others, and some of whose answers, if read by themselves, which of course could not fairly be done, do not indicate any difference, is speaking of a matter that happened four years ago; one of many cases that passed through his hands, as we may not unfairly assume; with nothing that we know of to cause him to recollect the form of words used in this particular case, while everything may depend on the turn of an expression; no dispute having arisen while the matter was fresh in his mind; and which, though he now puts it as a rather special kind of stipulation, he did not communicate at the time, or at any time, to the plaintiff.

The others occupy a very different position, and speak of the understanding conveyed to them, whatever were the precise words used at one part or another of the conversations in the woods or in the house, that the matter was to be in force for two years and no longer; and the defendant gave tangible proof of that being his understanding by waiting for the two years to pass, and then laying out money in improving his farm.



I cannot say I have any doubt that the agreement was as the defendant states it.

The conduct of the plaintiff in advertising the land after the two years has no significance, because in the first place he says he did not know of the limitation as to time; and in the next place he continued on into February, 1884 months after he must have known that the defendant repudiated his offer to Chambers, and, if I am not mistaken, after this action was begun.

But there is an alternative view of the contract which would, in my opinion, be equally fatal to the plaintiff's action. If there was no express limitation of time, can he contend that his authority to sell was to last for all time, and that while he was not bound to any definite course of dealing, the defendant was never to be at liberty to take the disposition of the farm into his own hands without paying him \$100? Such a construction could not, in my opinion, be admitted. A reasonable time must be intended. If the plaintiff sold within a reasonable time he would get his commission in full. If, without allowing him a reasonable time, the defendant withdrew the farm or sold it himself, he was to pay the half commission.

What would be a reasonable time would be a question of fact, and the opinions expressed and acquiesced in at the time of the making of the bargain would be good evidence on that issue, along with other considerations which, if we put ourselves, as far as our knowledge of the circumstances enables us to do, in the position of the parties when they made the bargain, we may suppose to have been in their contemplation.

I do not say that the time that may have been contemplated when the bargain was made would necessarily be held decisive. Circumstances may arise which are not anticipated, and make it unreasonable to look for what was reasonably enough expected. But when nothing happens to change the conditions in contemplation of which a contract is made, the opinions formed at the time, especially if held by both parties, may, I apprehend, be taken as fair grounds for deciding upon.

In this case it would be hard to find evidence on which to hold that two years was not a reasonably long time to effect a sale of a farm, or to tie up the hands of the owner from altering its condition or increasing its value—even leaving out of view the fluctuations in value which occur in a country like this, without respect to outlay in improvements.

I have looked at a large number of cases on the various branches of this contest, but I shall content myself with referring to only a few which strike me as more nearly in point.

I note *Ford v. Cotesworth*, L. R. 4 Q. B. 127, only for the purpose of reading from p. 133, a remark of Blackburn, J., "that whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances."

*Taylor v. Great Northern R. W. Co.*, L. R., C. P. 385, is an instance where a reasonable time was estimated in view of the occurrence of an obstacle not anticipated when the contract was made. The rule stated by Erle, C. J., at p. 287, is that "When there is no express contract there is an implied contract to deliver within a reasonable time, and that I take to mean a time within which the carrier can deliver, using all reasonable exertions."

*Lockett v. Nicklin*, 2 Ex. 93 is a very instructive case upon the two questions before us, the addition of a term by parol evidence to what appears in writing, and the implication of what is reasonable where an express stipulation is absent. I call attention to the report of the arguments, with the interspersed dicta of the Judges, as being particularly worthy of reference, and shall read a short extract from one of the judgments. Alderson, B., said at p. 100: "The documents in question are not a contract, but are writings out of which, with other things, a contract is to be made. The question then is whether the defendant has not a right

to adduce evidence, not to contradict the written instruments, but to shew the real contract, of which the paper contains only one of the terms. In order to do that the defendant must resort to the previous conversation."

In *Spartali v. Benecke*, 10 C. B. 212, a vendor of goods which, by the bought note, were "to be paid for by cash in one month, less 5 per cent. discount," refused to deliver them until paid the cash. He was held bound to deliver in a reasonable time, although he had to wait a month for the cash.

*Ellis v. Thompson*, 3 M. & W. 445, touches the question of the implication of a reasonable time for performance when the contract is silent as to time, and also the question of the evidence proper to be given to aid in deciding what is reasonable. I refer to the judgments of Lord Abinger and Alderson, B., which, I think, fully bear out the remarks I have made on those subjects.

I think we should allow the appeal, with costs, and dismiss the action, with costs.

OSLER, J. A.—The land not having been disposed of in consequence of the defendant's refusal to sell to Chambers, the plaintiff, even assuming that the relation of principal and agent was a continuing one, is not entitled to sue for or to recover the commission, *qua* commission, on the terms of the agreement. The rule would have been the same if the defendant had rejected a similar offer procured within two years from the date of the agreement, though in that case the measure of damages might well have been the full amount of the commission: *Prickett v. Badger*, 1 C. B. N. S., per Willes, J.; *Parsons* on Contracts, 3rd ed. vol. 1 pp. 90, 99, 100; *Story* on Contracts, 5th ed., p. 259; *Simpson v. Lamb*, 17 C. B. 603; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, a very useful and instructive case on the rights of principal and agent in transactions of this kind.

I agree with my Brother Patterson that we cannot necessarily treat the agreement as one by which the defendant

bound himself to leave his farm in the plaintiff's hands for sale as long as he continued to own it, so as not to be able to shake himself free of it, except upon payment of the 1¼ per cent. commission.

If the plaintiff's contention is right he might at the end of ten years, or of any time, while the defendant owned the farm, and without further communication with him, have procured an offer to purchase it, and claimed the commission. But as no time was limited by the writing, a reasonable time would, in the absence of any other limitation upon the exercise of the agency, be implied by law: *Sibbald v. Bethlehem Iron Co., supra.*

I think, however, that the evidence shews very clearly that the parties did expressly agree that the time should be limited to two years, and that is not inconsistent with the written agreement. Substantially, the third paragraph of the statement of defence is proved, and as I agree with the view which my Brother Patterson takes of the evidence, I think the appeal should be allowed, with costs.

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## PARKES V. ST. GEORGE.

*Chattel mortgage—Consideration expressed—Future advances—Assignment for creditors—R. S. O. ch. 119—Simple contract creditor—Fraudulent assignment.*

A judgment or execution creditor is entitled to impeach a chattel mortgage on the ground of an irregularity or informality in the execution of the document, or by reason of its non-compliance with the provisions of the Chattel Mortgage Act (R. S. O. ch. 119); but a creditor who is not in a position to seize or lay on an execution on the property, cannot maintain an action to have the instrument declared invalid.

A creditor in that position can only maintain such a proceeding where the security is impeached on the ground of fraud.

Q. and A. carrying on business as licensed victuallers were indebted to the defendant S., a wine merchant, to the amount of \$1,551.66; and being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefor, which S. agreed verbally to make upon receiving security for such advances as well as such prior indebtedness, and Q. and A. accordingly on the 24th of January, 1882, executed a mortgage to S. on all their stock-in-trade, securing \$2,400, S. agreeing to make the further advances in money and goods, as they should require them in the course of their business, and he did in fact between the date of the execution of the mortgage and the 3rd of March following, advance to them \$300 in money and goods, and the balance of the further advance was ready to be given to them at any time during that period. The affidavit of indebtedness in the sum of \$2,400 was in the usual form, and the mortgage was duly registered. On the last mentioned date, Q. and A. executed a deed of assignment for creditors to the defendant C. of all their estate, whereupon S., treating this assignment as a breach of the covenant against selling or parting with possession of the goods, seized them in the hands of the assignee and sold the same, undertaking to hold the proceeds subject to the order of the Court. Thereupon the plaintiff, a simple contract creditor of Q. and A., upon a demand due at the date of the mortgage, instituted proceedings seeking to recover payment of his claim for \$101.94 and interest, and also seeking, on behalf of all the creditors of Q. and A., to have the mortgage declared void, and the amount realized on the sale of the goods paid to the assignee.

*Held*, that even if the fact of the mortgage being expressed on the face of it to be made for a sum greatly in excess of what it was proved was due, was such an objection as might render the security void under R. S. O. ch. 119, as against creditors, yet it being clearly shewn that everything between the parties in connection therewith was done *bonâ fide*, and there being no creditor in a position to seize the goods if the mortgage were set aside, the plaintiff could not succeed, and the Court [PATTERSON, J. A., dissenting] reversed the judgment of the Court below, (2 O. R. 342.)

*Per* PATTERSON, J. A., the mortgage and the affidavits accompanying it, though in their form and statements complying with all that is prescribed by the statute, being untrue in fact rendered the security void.

*Per* BURTON, J. A.—Although no ground was shewn for impeaching the transaction as a fraudulent preference, the mortgage under the Chattel Mortgage Act, R. S. O. ch. 119, was invalid as against creditors who were in a position to attack it, which the plaintiff here was not, and as any informalities in the transaction were cured by the mortgagee having



taken possession of the property, the plaintiff could not maintain the action.

*Per OSLER, J. A.*—The agreement between the mortgagors and mortgagee might be looked upon as having been really one for a present advance, though the amount was to be paid out to them as they required it. It was not necessary therefore that it should be set forth in the mortgage under sec. 6 of the Chattel Mortgage Act, R. S. O. ch. 119.  
*Barker v. Leeson*, 1 O. R. 114, dissented from, per BURTON, J. A.

THIS was an appeal from a judgment of the Chancery Division pronounced on the 23rd of December, 1882, by the Chancellor, in an action wherein James Parkes was plaintiff, and Henri Quetton St. George, Joseph Quinolle, Florent Arnold, and Edward Roper Curzon Clarkson, were defendants, seeking under the circumstances set forth in the statement of claim, and which sufficiently appear in the judgment, a declaration by the Court:

(1.) "That the chattel mortgage in the pleadings mentioned as regards the plaintiff and the other creditors of the defendants Quinolle and Arnold, is void and invalid on the grounds hereinbefore set out. (2.) That the defendant St. George may be ordered to deliver up possession of the said goods and chattels to the defendant Clarkson and account to him therefor, to be by him disposed of and the proceeds applied in payment of the claims of all the creditors of the defendants Quinolle and Arnold ratably and proportionally, as provided for by the aforesaid trust deed to him. (3.) That the defendants Quinolle and Arnold may be ordered to pay the plaintiff the said sum of \$101.94 and interest forthwith, and in default thereof, that execution may issue against them to enforce payment thereof. (4.) That the defendant St. George may be restrained from selling or disposing of the said goods and chattels, or of any part thereof. (5.) That the defendant St. George may be ordered to pay the plaintiff's costs."

The action came on for trial on the day above mentioned when judgment was given in favour of the plaintiff, and it was ordered and adjudged:

"(1.) That the plaintiff do recover from the defendants Joseph Quinolle and Florent Arnold one hundred and one dollars and ninety-four cents. (2.) And this Court doth declare that the chattel mortgage from the defendants Joseph Quinolle and Florent Arnold to the defendant Henri Quetton St. George, dated the 24th day of January, one thousand eight hundred and eighty-two, in the pleadings mentioned, upon the goods and chattels of the said defendants Quinolle and Arnold, is fraudulent and void as against the plaintiff and the other creditors of the said defendants Quinolle and Arnold, who may come in and contribute to the expenses of this action, and doth order and adjudge the same accordingly. (3.) And it appearing that the defendant St. George; under the powers contained in

the said chattel mortgage; has sold the goods and chattels therein mentioned, and that by arrangement between the plaintiff and other creditors of the said Quinolle and Arnold and the said defendant St. George; the proceeds therefor are held by the solicitor of the said defendant St. George, to abide the result of this action, this Court doth further order and adjudge that the said defendant St. George do forthwith pay the said proceeds; being the sum of ten hundred and thirty-two dollars and thirty-eight cents, to the defendant Clarkson; as trustee under the deed of assignment dated the 3rd day of March last past, in the pleadings mentioned. (4.) And this Court doth further order and adjudge that the said defendant St. George do pay to the plaintiff his costs of this action forthwith after taxation thereof. (5.) And this Court doth further order and adjudge that the taxing officer do take an account of the costs of the plaintiff; as between solicitor and client; and the costs, charges; expenses and disbursements of the plaintiff of and incidental to this action over and above plaintiff's costs; as between party and party. (6.) And this Court doth further order and adjudge that the said defendant Clarkson do, out of the proceeds of the said goods which shall come into his hands, pay to the plaintiffs their costs of this action; as between solicitor and client, over and above what they shall recover from the defendant St. George, and that the residue of the said proceeds be applied in accordance with the trusts declared by said deed of assignment."

The other facts of the case and the evidence adduced at the trial are stated in the report of the case in the Court below (2 O. R. 342), and the present judgments.

The appeal came on for hearing on the 22nd and 23rd days of October, 1884.\*

*Moss*, Q.C., for the appellant.

*Cassels*, Q.C., for the respondent.

The points raised and cases cited appear in the judgments.

December 18, 1884. HAGARTY, C.J.O.—This case depends on the validity of a chattel mortgage dated 24th January, 1882, given by Messrs. Quinolle & Arnold to the defendant St. George.

The mortgagors were licensed victuallers in Toronto. The defendant was a wine merchant and supplied them with liquors, &c. They owed him about \$1,600 for sup-

\* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

plies, and had from time to time given notes therefor in various sums, which had been partly paid and renewed in the bank.

The mortgagors wanted further supplies and help in money from the defendant. He was anxious to have some security. He agreed with them to advance money or supplies of goods to them to the further extent of \$800 on their executing this mortgage to him.

Accordingly the mortgage was given. In consideration of \$2,400 expressed to be paid to them they assigned to the defendant all their goods in the schedule annexed, and then being in the premises known as the United Empire Club Building.

The mortgage money was to be repaid in twelve monthly instalments of \$200 each, commencing on the 24th February following, with interest at eight per cent., and contained a clause for quiet possession by the mortgagors until default in payment, with the right of entry and seizure on any attempt to sell or part with the possession of the goods.

The affidavit was in the usual statutable form, that the mortgagors were justly and truly indebted to the mortgagee in the sum of \$2,400, &c.

Some of the notes for goods were current at the date of the mortgage. But as I understand they were all for goods and moneys previously due.

None of the \$800 was advanced at the date of the mortgage.

On the 3rd of March, 1882, the mortgagors made a deed of assignment of all their estate to the defendant Clarkson, as assignee in trust for all their creditors.

The assignee went into possession. Treating the assignment as a breach of the covenant the mortgagee seized the goods in the hands of the assignee.

Between the date of the mortgage and the assignment the mortgagee appears to have advanced to the mortgagors about \$300 in goods and cash, and on February 25th he received from them \$200, being apparently the first monthly instalment under the mortgage.

On the 13th of March, ten days after the assignment for creditors, the mortgagee retired one of the current notes for \$121.37.

The plaintiff, Parkes, was a creditor of the mortgagors for some \$101, for goods sold prior to the mortgage in favour of the defendant, and he files this bill on behalf of himself and all other creditors to have this mortgage declared void as against the plaintiff and the other creditors, as having been made with intent to defeat and delay creditors, and to give an unjust preference; that there was no binding agreement to advance the \$800, and that none was made, and the mortgage does not fully set forth the terms for the future advances; and that the mortgagors were insolvent, &c., when the mortgage was given.

The answer denies all fraud, &c., and also objects to the plaintiff's right to impeach the transaction.

The learned Chancellor held that the plaintiff had the right to take this proceeding, and also that the proper deduction from the authorities was, that the mortgage was void under the statute. He says:

"It is, as in *Robinson v. Paterson*, 18 U. C. R. 55, a mortgage given in great part for a debt not existing, but for advances which the mortgagee had merely promised verbally to make, and which had not been made when the mortgage was executed, or the affidavit for registering made; and as against creditors it cannot be sustained."

As I understand the decision, there is no imputation of fraud, or bad faith of any kind, on the mortgagee's part.

The evidence on this point seems very clear.

The mortgagors were in debt to the defendant St. George for goods supplied from time to time, and notes were constantly being given and renewed wholly or in part.

In January the mortgagors wanted further help, and I think it clearly shewn that there was no idea on the defendant's part that the arrangement made on giving the mortgage would fail to enable them to go on with their business.



The defendant St. George was under the belief that the mortgagors dealt wholly with him as to their liquor supply, and acted on that belief. It appeared, however, that they were also indebted to a Montreal house, and to others.

It was considered that the proposed cash advance of \$800 would certainly enable them to get on. The defendant St. George, after taking the mortgage, went to England, leaving instructions with his clerks, Messrs. Todd and Millard, to advance this money to the mortgagors as they required it.

These gentlemen concur in stating that they fully believed this would enable the mortgagors to get on: that they thought they were doing a good business; that the money was to be advanced to enable them to carry on their business; that the money was ready for them when required: that they had started in business with a capital of about \$4,000 cash, and their rent paid a year in advance.

Assuming, as the fair result of this evidence, that the mortgage was taken in good faith, and without any idea of fraudulent preference or injury to other creditors, it only remains on this branch of the case to consider whether the mortgage must be held void in consequence of the alleged misstatement as to this \$800.

I gave this question my best consideration in the case of *Hamilton v. Harrison*, 46 U. C. R. 130; and a further consideration in the case before us leaves my opinion unchanged. I consider it is not a question of law, but of fact.

The statute has been complied with on the face of the mortgage and registration. It is something appearing in evidence that is said to avoid it. As Mr. Justice Gwynne said, in *Beecher v. Austin*, 21 C. P. at p. 346: "The *bona fides* of the transaction was unimpeached, and it cannot be doubted that the mortgage would have been perfectly good independently of the statute; and it does certainly seem to follow that a mortgage which would have been good but for the statute, cannot be avoided by the statute



when the conditions required for its validity by the statute are complied with."

If the rule be absolute that an affidavit, swearing that the mortgagor is indebted to the mortgagee in a named sum—the sum named in the mortgage itself—necessarily vitiates the security unless the mortgagor be *eo instanti* legally indebted to the mortgagee as sworn, it seems idle to attempt any distinction between what occurred in the present case as to the \$800, and a case in which the mortgagee had on the execution of the security given his note for that amount to the mortgagor. In both cases equally it is false to swear that the mortgagor is indebted to the mortgagee.

*Robinson v. Paterson*, 18 U. C. R. 55, is relied on. It is fully noticed in the judgment in *Hamilton v. Harrison*. There a mortgage was given for £100, only £40 really existing as a debt, and £60 promised to be further advanced.

The same Court, in *Baldwin v. Benjamin*, 12 U. C. R. 54, had upheld a mortgage in which the party making the affidavit swore, as here, to the debt in the ordinary form, the mortgage being given to indemnify the plaintiff for having become security for a debt due by the mortgagor to a third party, to whom the mortgagee had to give his own mortgage in security. The proviso in the chattel mortgage was for payment by the mortgagor of the amount secured in three instalments to the mortgagee, or to the third party the amount due by her to him, and keep the mortgagee indemnified therefrom.

In *Valentine v. Smith*, 9 C. P. 62, the mortgage was stated to be in consideration of the mortgagee having indorsed notes of the mortgagor for £800, and in consideration of further indorsements to be made from time to time, the whole not to exceed £800 at any one time. The proviso was for the mortgagor paying the notes and keeping the mortgagee indemnified. The affidavit was in the usual form, that the mortgagor was indebted in £800 as fully set forth in the mortgage.

Draper, C.J., held this sufficient, and said that he concurred in the principle of *Baldwin v. Benjamin*, 12 U. C. R. 54: "The mortgagee has used the very words of the Act in his affidavit, though adding others (perhaps unnecessarily) to explain that the consideration as expressed in the mortgage was the true existing consideration, and that the transaction was in good faith and without fraud," &c.

*Beecher v. Austin*, 21 C. P. 336, is much in point.

There the mortgagors were saw millers and had a large number of logs, and in order to enable them to manufacture them applied to the plaintiff for a loan of \$1,600. The plaintiff agreed to make the advances, but required security on the logs. The mortgage was given in consideration of \$1,600 in hand paid, &c. The affidavit was, as here, that the mortgagors were indebted in that sum. The agent of the mortgagee stated that he gave cheques for (in all) \$500 to the mortgagors on the day of the execution of the mortgage, and at their request retained in his hands \$1,100 subject to their order, as they did not want it then; and that afterwards they got it as they required it.

The Court upheld the mortgage against this objection, holding that the transaction was not one for future advances under the statute, and that *Robinson v. Patterson*, 18 U. C. R. 55, did not apply.

Full judgments are given by Gwynne and Galt, JJ., and by myself. It was treated by one learned Judge as a present advance, by another that it was to be assumed that the mortgagee retained the money as the mortgagor's, for their convenience, and (as it were) as their banker: *Baldwin v. Benjamin*, 12 U. C. R. 54, and *Valentine v. Smith*, 9 C. P. 62, are there noticed.

Gwynne, J., in addition to the words already cited, says, p. 346: "The objection when critically considered is, that the party making the affidavit could not conscientiously make and therefore ought not to have made the affidavit that the mortgagor was indebted to the mortgagees. Having made the affidavit required by the statute, the provisions of the statute are complied with; but upon a

careful consideration of the case I have come to the conclusion that in truth the transaction was such as to acquit the conscience of the deponent, and to justify his making the affidavit, for taking the whole contract together it was an advance made by the mortgagees upon a contract to be repaid in money, unless the mortgagors should avail themselves of a privilege granted to them to repay it in timber of certain qualities at certain agreed prices."

In *Walker v. Niles*, 18 Gr. 210, a mortgage was given for \$1070, of which \$500 or \$550 was represented by the mortgagee's note not paid till some months after. The affidavit was in the same form as here. Held, sufficient, in the absence of fraud, by Mowat, V. C. He says: "The mortgagor accepted the note as cash, and the amount thereby became a debt from him."

We thus find that as well before as after the decision of *Robinson v. Paterson*, in 18 U. C. R. 55, the Courts have held the affidavit in the statutable form to be sufficient, in the absence of fraud, where no debt, in the legal sense of the word, was in fact existing. It seems to me to be useless to make any hard and fast rule between the case when part of the consideration consists of a future promise to pay represented, *e. g.*, by a promissory note, and a promise in good faith to advance a part of the expressed consideration to the mortgagor as he might require it, or to hold it subject to his order.

In all such cases the facts should be carefully scrutinized to ascertain the presence or absence of fraud or pretended value or consideration.

Where, as in the case before us, there seems no shadow of bad faith, I cannot see how we can possibly hold this technical objection fatal to defeat an apparently just claim. We cannot so hold without, in fact, overruling several adjudged cases.

It is not easy to answer the dilemma suggested by Gwynne, J. Are we to declare a mortgage void which is strictly in accordance with the forms prescribed by the statute, when without the statute it would be a valid security?

In *Hamilton v. Harrison*, 46 U. C. R. 130, the important difference between the legislation as to Bills of Sale under the imperial and our own system is fully considered.

In the former, the consideration must be set forth for which such bill of sale was given, and the Courts held that consideration means "true" consideration. Our statute is silent on this point except in cases under section 6.

I am unable to agree with the Court below that *Robinson v. Paterson*, 18 U. C. R. 55, governs this case.

I agree in the result arrived at by my brother Burton, that the plaintiff has not established his right to raise this question.

I consider the principle laid down in *Longeway v. Mitchell*, 17 Gr. 190, following *Reese River Mining Co. v. Atwell*, L. R. 7 Eq. 347, does not reach this case. The creditor before judgment was allowed to ask to have a deed removed out of his way as being fraudulent under 13 Elizabeth. The deed was impeached as being fraudulent in itself, in its scope and design, and Lord Romilly put it on this ground: that "the Court will not give equitable execution until the creditor has put himself in a position to obtain execution at law, in which case there is no question of the statute at all, but that as soon as the Court finds that a deed has been executed for the purpose of delaying, hindering, or defrauding creditors, and that it comes within the statute, it sets the deed aside, but it goes no further."

Referring to this case our then Chancellor, in *Longeway v. Mitchell*, points out that if the creditor could not get this relief he might be entirely defeated by a conveyance from the fraudulent grantee to a *bonâ fide* purchaser whilst his action was in progress.

I cannot believe that such a principle can be invoked to set aside a deed in no way fraudulent or void in itself, but defective under our statute from an imperfect registration.

I agree in the opinion that when our Legislature declared the unregistered, (though intrinsically honest) deed void as against creditors, it meant creditors in a position to claim a right to seize or attach the goods mentioned in the



deed. The words "as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith," &c., to my mind suggest as meaning void whenever a contest arises as to the right to seize, attach, or deal with the chattels.

To allow this right to any and every creditor before judgment would, I consider, cause most serious embarrassments.

After five days from the execution of the deed, if not duly registered, the holder of an unpaid bill or overdue account might file a bill. The mistake might be at the same moment discovered, and a re-execution of the impeached instrument obtained, and a proper registration be effected, &c.

I do not consider the fact of the mortgagors in this case having made an assignment for creditors can affect the right.

If a creditor asks his debtor for some settlement or security, and they agree by deed that if the amount be not paid in three months, the creditors may then enter and take possession of certain named goods of the debtor; or, if a mortgage of the goods be executed but not registered with a clause allowing the mortgagor to hold for three months, and at the end of that time the mortgagee might enter and take possession, and under either of such instruments the creditor did so enter and have possession before any execution or attachment issued, I am of opinion he could rightfully hold the goods.

The English Bills of Sale Acts speak of "execution creditors" not merely of "creditors." It is significant that with the extreme care manifested in these Acts to avoid secret or fraudulent assignments of chattels, they should have carefully limited their operation to creditors having executions. I cannot believe our Legislature ever contemplated applying the remedy of registration to the case of every person having a claim or account against the mortgagor at the date of the instrument.



I think it has been the universal view and practice since the passing of our Chattel Mortgage Act to consider that its provisions as to non-registration or imperfect registration only avoided the deed as against persons claiming subsequently under the mortgagor or assignor and creditors in a position to claim the right to seize, attach or take the goods.

In the Court below the high authority of Sir J. Robinson is declared as in favour of the construction they adopted, referring to *Rogers v. Vancamp*, 10 U. C. R. 515. The words are: "Vancamp is now shewn to be a judgment creditor entitled to question the validity of the mortgage.

\*      \*      It is established clearly that he was in fact a creditor when this mortgage was given, and when he shews that, he compels us to hold the mortgage void as against him from the first, and not merely from the time that his judgment was entered."

It had been urged in that case that the judgment was irregular. The Court refused to inquire into this, saying: "It is of no moment. Vancamp is not less a judgment creditor nor less entitled by reason of any irregularity of that kind to object against the mortgage."

I am unable to see how the case supports the view adopted below.

The affidavit prescribed by the statute is, that the instrument is not made for the purpose of protecting the goods and chattels against the creditors of the mortgagor or of preventing them from obtaining payment.

Again, sec. 5, as to a sale: the affidavit is, that it "is not for the purpose of enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainer."

Under sec. 6: that it is not for the purpose of securing the goods against the creditors.

Under sec. 9, where the mortgaged goods are about to be removed out of the county, certain provisions are made as to registering in the new county, "otherwise the said goods shall be liable to seizure and sale under execution; and in such case the mortgage shall be null and void as against

subsequent purchasers and mortgagees in good faith for valuable consideration, as if never executed."

I think all these provisions point to the conclusion that the creditors mentioned in the Act are creditors in a position to seize, levy, or attach the property sold or mortgaged.

BURTON, J.A.—Although I agree that there is no ground shewn for impeaching the mortgage in this case as a fraudulent preference, I am of opinion that it was invalid under the provisions of the Chattel Mortgage Act. It professes to be given for an existing debt of \$2,400, whereas one-third of this amount was not due as a debt at all, but was for advances yet to be made by the mortgagee to enable the mortgagors to carry on their business.

I agree with the reasoning of the late Sir John Robinson, in the case of *Robinson v. Paterson*, 18 U. C. R. 55, that, "admitting that there was nothing morally wrong intended, the question would be, whether since the 20 Vict. ch. 3 a mortgage will be valid which is taken in great part for a debt not actually existing, nor for advances which the mortgagee has not agreed in writing to make, but which he had merely talked of making and had not made when the mortgage was executed. \* \* If, he says, (as was actually the case here) "the plaintiffs had failed to pay the money afterwards the mortgage would still have stood incumbering the debtor's property, and deterring judgment creditors from enforcing their executions."

*Walker v. Niles*, 18 Gr. 220, was very different. The mortgagor had in good faith received as cash the mortgagee's note as part of the consideration, and the mortgagee might without any impropriety make the affidavit that the mortgagor was truly indebted to him in the amount advanced in that way.

*Baldwin v. Benjamin*, 16 U. C. R. 52, was decided after the first Chattel Mortgage Act, and before the amendment created by the 20 Vict. ch. 3. It is not necessary to offer any opinion as to whether the mortgagee could quite consistently make the affidavit of indebtedness there, as I

apprehend, notwithstanding the very general words of the Act—viz: that every mortgage or conveyance intended to operate as a mortgage not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, should be in writing, and should be absolutely void unless registered within a certain specified time as therein directed, if the affidavit of *bona fides* could not be made in the form prescribed by the Act, it could not be brought within it, and being good at common law, and incapable of registration with the required formalities, registration was not necessary at all to make it effectual even against creditors.

The present Act does provide for mortgages for future advances, and although the language of section 6 is not very happy it must, in connection with the other sections relating to mortgages, be held I think to mean this, that every such mortgage must be in writing and be registered, and in addition the agreement to make such advances must be in writing and the advances must be repayable within a year, and the mortgage must set forth the terms, nature, and effect of such agreement and the amount of the liability intended to be thereby created; and the affidavit of *bona fides* must in addition thereto state expressly that the mortgage does truly set forth the agreement, and does truly state the extent of the liability intended to be created by such agreement and covered by the mortgage; and if a mortgage given for advances does comply with these requirements and is registered, the same shall be as valid and binding as the mortgages mentioned in the preceding sections of the Act.

The distinction in the present case is, that the mortgage is in fact taken in part to secure those future advances, and the formalities not having been complied with has no greater validity against creditors than the other chattel mortgages referred to in the preceding sections, which are declared to be absolutely null and void as against such creditors, unless duly registered with the affidavits required.

As I understand the *ratio decidendi* in *Beecher v. Austin*, 21 C. P. 343, it was there assumed that the money had been advanced at the date of the mortgage to the mortgagor, and by him deposited with the mortgagee as his banker. Upon that assumption the mortgage was not open to objection, but it is altogether different from the present case, there being no evidence of that nature.

I agree therefore with the conclusion of the dissentient Judge in *Hamilton v. Harrison*, 46 U. C. R. 127, that such a mortgage as the present cannot be upheld as against an execution creditor.

In *Carlisle v. Tait*, 7 A. R. 10, in this Court, I was of opinion that a person who had purchased under the power of sale in a mortgage was not bound to register as against the creditors of the mortgagor. I think that view is fully borne out by the recent decision in *Cookson v. Swire*, in the House of Lords, 9 App. Cas. 653. The Lord Chancellor referring to the words "goods and chattels comprised in such bill of sale," and the words that the bill of sale shall be "null and void," said it was impossible that they could have been meant by the Legislature to apply to a case in which the existing title does not depend upon the bill of sale, and in which the goods were not for any present purpose comprised in the bill of sale at all. That case appears to me also to be important as bearing upon the other branch of the case, which in the view I take of the invalidity of this mortgage it becomes necessary to consider, viz., the right of the plaintiff to file a bill to set aside a security of this nature for some informality in it under the Chattel Mortgage Act, before he is in a position to impeach it by means of a seizure under an execution.

This is a novel, and to my mind a very startling application of the doctrine acted upon in the *Reese River Mining Co. v. Atwell*, L. R. 7 Eq. 347, and one which cannot, in my opinion, be sustained, although it gains some kind of support from the decision of the majority of this Court in *Re Barrett*, 5 A. R. 206. But, notwithstanding that decision, I think there is no pretence



for the extension of the doctrine to a case of a creditor who has no execution and who does not fill the position of a person having, so to speak, a statutory execution on behalf of all creditors, like an assignee in bankruptcy. I can see no reason why such a person should be at liberty to file a bill to keep matters in *statu quo* until he can obtain an execution, merely because there is some informality in the mortgage under the provisions of the Chattel Mortgage Act; a defect which the mortgagor could at once remedy if brought to his notice.

I wish to call attention to the words of our Act, which are merely that the bill of sale shall be null and void as against creditors, the English Acts being void as against all trustees and assignees in bankruptcy, and also against all sheriffs' officers or other persons seizing in the execution of any process, and against every person on whose behalf such process shall have been issued. And some of the more recent of the English Bills of Sale Acts make the unregistered mortgage void even against assignees for the benefit of creditors.

It was held in *Re Barrett*, although I ventured to dissent from the decision in that case, that an assignee in insolvency was in a position to take advantage of a formal defect in a security of this kind. I may be allowed, without disrespect, to say that I am still unconvinced of the correctness of that decision. It was decided in March, 1880; and in the following month of May, I find in the judgment of the English Court of Appeal some remarks of Lord Justice James, in *Greaves v. Tofield*, 14 Ch. D. at 574, which go strongly to confirm me in the view I then expressed. The contest there arose on a law requiring the registration of annuity deeds, and the question there was, among other things, as to the meaning of the word "creditors," as there used in the enactment declaring that any annuity or rent charge shall not affect any lands, &c., as to purchasers, mortgagees or creditors, unless and until a memorandum shall be left with the proper officer.



Lord Justice James remarks: "With regard to creditors, there seems to be some difficulty in knowing what creditors are meant in this section, because the recital refers only to purchasers, which would include mortgagees. I take it that the word 'creditors' must mean creditors who would, in some way or other, be affected: that is to say, creditors who would have some estate, or interest, or right in or to the land. Those might be judgment creditors, who according to the former decisions, take nothing but what was legally and equitably the property of the debtor, and it cannot have been intended to enlarge their right. The only other class of creditors who, as it seems to me, could come in would be the general creditors represented by the trustee in bankruptcy, and the trustee in bankruptcy is a person who (except in peculiar cases provided for by the bankruptcy law) *can only take that which the debtor himself had*. It is utterly impossible, as it seems to me, to put the trustee in bankruptcy in any better position or on any higher footing than the debtor himself."

The Insolvency Act is no longer in force, and I am offering no opinion as to whether it would be desirable or the reverse that the assignee should be placed in a position to impeach such a security. All I contended for in *re Barrett*, 5 A R. 206, was, that the Legislature had not in relation to chattel mortgages, as, in the English Acts, declared that a chattel mortgage should under certain circumstances be void as against trustees in bankruptcy, and as against all sheriff's officers seizing the goods comprised in it, but simply against creditors, there being at the time of the original passing of the Chattel Mortgage Act no insolvency law in force, and as the Legislature, which subsequently passed the insolvent law, so far from making such a declaration in terms, provided that the interest only of the insolvent should vest in the assignee, subject to the charges made by him as they then existed, the assignee took only the interest still remaining in the debtor.

I may refer upon this point to *Ex parte Dalby*, 1 Lowell 431, that the assignee in the absence of fraud in fact.

represents the bankrupt, and takes only what he had, and that he is therefore fairly one of the parties within the statute between whom the transaction is good : *Milford v. Milford*, 9 Ves. 87 ; *Sherrington v. Yates*, 12 M. & W. 855 ; *Audenried v. Betteley*, 5 Allen 382.

Before parting with *Re Barrett* I wish to refer to a remark of my Brother Patterson as to the possible effect, in his view, of an execution creditor, who has placed his writ in the sheriff's hands after the insolvency of the debtor, being left in a position to seize and realize from the debtor's goods under his writ. I do so in consequence of its relevancy to the position of an execution creditor in a case like the present, where a voluntary assignment intervenes. And with great deference, that view is, I think; founded on a fallacy. Take the case of a sale of the goods to a purchaser. The interest of the insolvent debtor, whatever it may be, vests in the purchaser. All that the execution creditor can attach is whatever interest the debtor has ; it is only when he can seize that interest that he can say the charge is void, and not being able to seize it by reason of its having passed to the purchaser, the interest of the mortgagee, previously liable to be defeated, becomes valid, and he, accidentally, as in *ex parte Blaiberg*, 23 Ch. D. 254, obtains an advantage by the sale, or, as in the present case, by the insolvency of his debtor and an assignment for the benefit of creditors.

In the present case the defendant Clarkson is an assignee under a voluntary assignment, and takes only such interest as his grantor was able to convey, and is not in a position to impeach this mortgage given to St. George in any way. But what is claimed is, that any creditor may, without recovering judgment and execution, file a bill on behalf of all other creditors to set aside this mortgage, and thus secure for the assignee indirectly what he cannot obtain directly.

Long as this enactment has been upon the statute book this is, I venture to think, the first time in which it has been attempted to give such an interpretation to it. When

a conveyance, not fraudulent in itself, is declared by statute to be void as against creditors, by reason of the omission of some formality, it means, I apprehend, that it shall not prevail to prevent their seizing when their claims are in such form as to give them a lien on the property comprised in the conveyance.

Is a wider construction to be put upon the words of this statute "shall be absolutely null and void as against the creditors of the mortgagor" than has been given to similar or even stronger language under a Bankruptcy or Insolvent Act? Under the 1st Vict. ch. 110, the words were, that certain voluntary transfers made by a person in insolvent circumstances should be deemed, and were thereby declared to be fraudulent and void as against the assignee. The question arose in *Billiter v. Young*, 6 Ell. & Bl. 1, as to the meaning of the words "fraudulent and void"—did they mean to make the transaction fraudulent and absolutely void as against the assignee, or only to put such transactions on the footing of fraudulent preferences under the bankruptcy law before they were made Acts of Bankruptcy and so only voidable, and the property vested till avoided. I can see no good reason why a more stringent construction should be placed upon this Act. There is no element of actual fraud in the transaction. The mortgage is registered, but a formality has been omitted, but it is perfectly valid between the parties and against all the world, but a person who being a creditor has placed himself in a position to seize and enforce a lien superior to that of the mortgagee.

In *Billiter v. Young*, the Court point out the distinction between such a case and cases of frauds against creditors by debtors conveying to others without valuable consideration with intent to defraud or defeat creditors, which transactions are absolutely void under the Statute of Elizabeth and at common law.

The majority of the Judges in the Exchequer Chamber were of opinion that the transaction was absolutely *void* "ab initio," and not merely voidable; Williams, J., Crowder,

J., and Lord Wensleydale being of the contrary opinion, which latter opinion was sustained by the House of Lords. As pointed out on argument there, it never could have been intended that the transfer should be absolutely void from the first for then if the property remained in specie it might be taken from every *bonâ fide* purchaser, not only the second but the tenth or fifteenth purchaser, and the illegality of the transfer would not depend on any act of the purchaser, but on that of the insolvent.

A decision was referred to by the learned Chancellor, which has been very much questioned in more recent cases, but which turned upon the peculiar language of the statute under which it was decided, the Bills of Sale Act of 1854. I refer to the case of *Richards v. James*, L. R. 2 Q. B. 285. The language there used was, "*shall be null and void to all intents and purposes.*" The first bill of sale in that case was, as regards an execution creditor, unquestionably void, as at the time of the levy the goods were in the possession of James, the execution debtor, and as there was an interval of more than twenty-one days after the making of the bill of sale and it still remained unregistered; but the effect of that decision was to declare it avoided as to the subsequent bill of sale, although if there had been no execution it would have been entitled to priority.

Doubts were expressed as to the correctness of that decision by the late Sir George Jessel in *Re Artistic Colour Co.*, 21 Ch. D. 210; and it was also referred to as being open to question in *Hunter v. Turner*, 32 L. T. N. S. 556.

But in a case decided last year by the English Court of Appeal under the Bills of Sale Act of 1878, the case of *Ex parte Blaiberg*, 23 Ch. D. 254, when the decision of *Richards v. James*, L. R. 2 Q. B. 285, was pressed upon the Court, they pointed out that the language of the Act, at all events, was different; that which they were then considering being simply, "shall be deemed fraudulent and void," and the language of the then Master of the Rolls is this: "I understand section 8 to mean that an unregistered



bill of sale is not to be void altogether, but only against certain persons and under certain circumstances. In the first place it is to be deemed fraudulent and void as against the trustee in bankruptcy if at or after the time of the filing of the bankruptcy petition, and after the expiration of the seven days allowed for registration, the goods are in the possession of the grantor. Similarly, it is to be void as against all sheriffs' officers seizing any chattels comprised in it in the execution of process against the goods of the grantor, and also against every person on whose behalf such process shall have issued. What is meant by being fraudulent and void as against a person who has a demand against the goods? Surely it must mean void in order to give effect to that demand. I cannot understand the words 'as against' in any other sense. If it meant void to all intents and purposes, why did not the Act say so?"

The effect in that case was singular enough. When the execution creditor levied it avoided the bill of sale as to him, but the debtor after the levy became bankrupt, and the title of the trustee relating back to a time anterior to the seizure, the goods were not the goods of the debtor at the time of the levy, and inasmuch as after the levy and before the filing of the bankruptcy petition the grantee in the bill of sale had taken possession, his bill of sale was set up as against the trustee.

There are *dicta*, I am aware, of Judges in our own Courts to the effect that unless possession is taken immediately, or the mortgage registered within the prescribed time, the mortgagee cannot improve his position and make his title valid by taking possession.

In *Fraser v. Lazier*, 9 U. C. R. 679, decided under the old Act 12 Vict., in 1853, it was unnecessary to decide the point, as the mortgage was of a term of years, and not of goods and chattels. The mortgage was registered and had been allowed to expire; if it had been of goods and chattels it would have ceased to have validity against creditors, as the mortgagor was still in possession; but it is

equally clear that if instead of re-filing, the mortgagee had taken possession at the expiration of the mortgage, his title would have prevailed against the execution creditor. The language of the Chief Justice must, I think, be looked at in connection with the actual facts of that case, upon which there can be no question that the mortgage must have been held invalid if it had come within the statute. The case was decided some years before *Billiter v. Young*, 6 E. & B. 1.

In the case of *Shaw v. Gault*, 10 C. P. 236, the question was, whether the bill of sale was valid against an execution if placed in the Sheriff's hands within the five days allowed for filing. The Court there held, contrary to the decision of the Queen's Bench in *Feehan v. The Bank of Toronto*, 19 U. C. R. 474, and contrary to what has since by Statute been declared to be the law, that the instrument was void for want of registration the mortgagor being still in possession.

But I am not aware of any express decision to the effect that if there is a bill of sale valid between the parties the mortgagee may not perfect his title by taking possession.

Under the English Act, the matter in the case I have referred to was treated as too clear for argument, the only doubt expressed was, whether such a taking possession would validate the security where the act was not authorized by the terms of the mortgage; but the Court decided that in such case to be effectual it must be an actual taking possession of every thing, and not a mere constructive possession. *Ex parte Fletcher*; *In re Henley*, 5 Ch. D. 809.

I fail to see, so far as this particular question is concerned, any material difference between the English Act and our own.

Under both the mortgage is void as against certain parties unless possession is taken within a certain time. During that period, that period being under our own Act five days, under the English Act seven, the bill of sale is good against an execution or other claim, though the goods still remain in the possession of the debtor, and the

deed is unregistered. After those periods the deed is void if the goods still remain in the possession of the debtor.

If the English decisions be sound, that a bill of sale void as against creditors by reason of non-registration within the seven days can be made valid as against them without any additional act of the debtor, but by the mortgagee merely taking possession, I am unable to find any solid or substantial ground for applying a different rule to our own Act.

The language used by some of the Judges in the case I have referred to in the House of Lords goes strongly, I think, to confirm this view. The bill of sale there was an unregistered bill of sale, and void therefore as against creditors.

The mortgagee knew this, and was expecting an execution against the mortgagor, but he could not exercise his power of sale without making a previous demand, and waiting for a certain time, and it was assumed that the sale was made for the very purpose and object of defeating a creditor; but I cite the case for Lord Blackburn's language, which I am about to quote: "It is conceded that it would have been perfectly good when that notice had been given if Mr. Swire the mortgagee, acting in his own interest, had come with porters and taken the goods and carried them out of the house, although that had been done only two minutes before the sheriff's officer had turned the corner of the street to come and seize them," and again: "After having given due notice by which he was enabled either, as I said before, to come with porters and carry away the goods and to put an end to the matter or to sell." I refer again to Lord Blackburn's remarks at p. 669: "But the Act does not make it void as against those who become entitled to the goods by virtue of his exercising the power before even the person's claim came into existence who had the right to say the bill of sale was void, and that was not until the time of the execution, when the sheriff's officer came in in the present case."

The question is, whether, under our own Act, which uses the word "creditors" generally, anything more is meant than a creditor who has it in his power to lay hands upon the goods under legal process. That has been hitherto almost the universal reading of the Act by the profession, and is, in my opinion, the correct reading. Must it not necessarily be so? Until that moment the debtor can do what he likes with the property, and so can a mortgagee who is owner subject to the debtor's right to redeem which he could not do if the mortgage was all the time a nullity and void.

At common law a man could take security upon goods without taking possession. If left with the mortgagor it furnished evidence from which a jury were at liberty to infer fraud. This led to frequent contests, in which the question was, whether it was in truth a fraud, and this led to the passage of the Chattel Mortgage Act, which required mortgages to be in writing where the mortgagor remained in possession, and required it to be registered within a certain number of days if the mortgagor were left in possession, or it would be void against the mortgagor's creditors; but it was a perfectly good mortgage between the parties, and I am unable to see why the mortgagee could not, under our Act, as under the English Act, perfect his title by possession, if entitled to take possession, as in the case supposed by Lord Blackburn.

And in the United States the more recent decisions all lean in the same direction. Mr. *Hilliard*, in his work on Sales, after referring in the text to some decisions, adds in a note :

"And the general rule may be laid down, that when a vendee takes possession at a time subsequent to the sale but before the rights of creditors accrue by attachment or otherwise, he shall hold against creditors," and refers to *Bartlett v. Williams*, 1 Pick. 288, a decision of the Supreme Court of Massachusetts. To the same effect is *Kendall v. Sampson*, 12 Verm. 518, in the Supreme Court of Vermont, and the concluding portion of the judgment states the law as I conceive it should be held under our statute.



"Though upon the sale of a chattel there may not have been such a change of possession as is necessary to protect it against the creditors of the vendor, yet such change may be perfected at any time before an attachment intervenes. If the change does not immediately follow the sale, this would indeed be proper matter to go to the jury on the question of a fraudulent sale in fact, but it would be too much to hold that the change in the possession could not be perfected subsequently to the sale so as to avoid the effect of the principle applicable to sales fraudulent *per se*, provided no attachment had intervened.

"The principle which pronounces a sale which is in fact *bonâ fide* and for good consideration fraudulent against creditors for the want of a sufficient change in the possession is founded upon policy, but it is not to be extended beyond what sound policy dictates."

In the same way the Court of Appeal in the State of New York, held in *Leven v. Russell*, 42 N. Y. 255, "that the omission of the mortgagee to file a statement after the expiration of a year as required by Statute to preserve his lien against creditors of the mortgagor, was obviated by proof shewing that the mortgagee took possession by virtue of his mortgage, and before the lien of any creditor had attached."

So in the Supreme Court of Illinois, *Frank v. Miner*, 50 Ill. 444, it was held that although a mortgage was void as against creditors for want of filing, if the mortgagee took possession in pursuance of provisions contained in the mortgage he would occupy the same position as if possession had accompanied the mortgage at the time it was executed, unless valid liens had intervened before possession was taken.

But how is it possible, practically, to work out the rights of the parties under an Act like the present, except by following the rule which has always obtained in the Courts from *Martin v. Podger*, 5 Burr. 2631, downwards, questioned, it is true, in *Bessey v. Windham*, but finally affirmed in *White v. Morris*, 11 C. B. 1015. There the assignment was clearly an operative assignment. As between the parties it was intended to convey the legal property in the goods and it could only be disputed by creditors, and no per-

son could attack it unless he could shew a judgment and execution. It would be a strange state of things if a creditor, not having an execution, could file a bill to declare a security void on the mere ground of a formal defect, which might be cured by the execution of a new and perfectly valid security.

I can quite understand that where an instrument is executed with the fraudulent intent of withdrawing the property from the reach of creditors, there might be no good reason why a creditor should not be at liberty to file a bill to set aside the instrument seeking to effect that fraudulent object.

*Reese River Mining Co. v. Attwell*, L. R. 7 Eq. 347, was a case of that description. There the debtor, knowing that an adverse decision in a pending suit was about to be pronounced against him, made a voluntary conveyance of all his property, reserving a power to the trustees to pay him such income as they might think fit. The transaction was fraudulent at common law, and came within the exact words of the statute and exposed the parties to criminal proceedings.

When once set aside the grantor could not by a new instrument of a like kind defeat his creditors.

There, however, the transaction was fraudulent in itself. There is no objection in law or morals to a debtor giving security to a creditor, and if a decree were made setting it aside, there could be no objection to his substituting a perfectly valid security immediately afterwards.

The assignment to Clarkson cannot be an element in the case. If this creditor had a right to file a bill, he could have done so the moment the bill of sale was registered; but it is of importance in connection with the matter I have referred to above as shewing that this plaintiff never could obtain a lien on the goods by execution, and I may, in the same connection, again refer to *Re Barrett*, 5 A.R. 206. The opinion of the late learned Chief Justice of this Court, for which I need not say I entertain the greatest respect, fluctuated greatly before he came to a conclusion, and he

was ultimately a good deal influenced, as my Brother Patterson points out in that case, by an American decision: *Miller v. Jones*, 15 Nat. B. R. 150. But whatever the value of that decision, it would have been fatal to the plaintiff's claim in this case.

The learned Judge who delivered the judgment in that case, after holding that an assignee in bankruptcy had equal rights with an execution creditor, adds: "But his rights are no greater," referring to the fact that the mortgagee had taken actual possession of the goods, which was held to make good his security against the assignee or execution creditor. To the same effect are *Ex parte Fletcher*, 5 Ch. D. 809; *Robins v. Clark*, 45 U. C. R. 362.

Here the mortgage was dated 24th January, 1882, the assignment to Clarkson 3rd March, 1882. This was a breach of the condition of the chattel mortgage, which if not *absolutely void*, entitled the mortgagee to enter, and he did enter and seize on the 11th March. The proceeding on the part of the present plaintiff was commenced on the 4th April, the mortgagee being then in possession.

If the plaintiff had obtained an execution before the assignment he might have seized the interest of the debtor before the mortgagee went into possession, and he might then have said: "Your mortgage as against me is void," but he cannot make a seizure as the assignment intervenes, and if it were away the equity of redemption is all that he could seize, as the mortgagee had cured all defects by taking possession.

I have referred to the case of *Barker v. Leeson*, 1 O. R. 114, but with very great respect for the learned Judge who gave that decision, I must dissent from it. If that case is carried to its full extent no person can venture to sell his property at all so long as he has any creditors. If the debtor there had given no mortgage *he* would have been at liberty to sell to the *claimant*. What difference can it make that he and his mortgagee join in the transfer, although if the creditor had obtained an execution against the mortgagor he might have treated the mortgage as invalid

against him. I am not prepared to say, and it is not material in the view which I take of the case, that the learned Judge's interpretation may not be correct as to what is included in the term "creditor." It is sufficient for my purpose to say, that unless being such creditor he has placed himself in a position to assert a specific lien he has no "*locus standi*."

In the case referred to of *Holmes v. Vancamp*, 10 U. C. R. 515, the learned Judge, Sir John Robinson, was discussing the right of the claimant to object to the regularity of the proceedings anterior to the judgment, and his remarks amount to this. The claimant is shewn, at all events, apart from the judgment, to be a creditor, and being here with a judgment and execution, however irregularly it may have been obtained, he is entitled to impeach this mortgage. All that was necessary to shew was the judgment and execution, and without them the fact that he was a creditor would have availed but little.

This is in my opinion an experiment to extend the principle on which *Reese River Mining Co. and Attwell* L. R. 7 Eq. 347, was decided to cases under the Bills of Sale Act, and fails, and I think properly fails, for the reasons I have endeavored to point out. If it could be sustained it would introduce an element of uncertainty in connection with securities of this nature which would practically render the Bills of Sale Act a dead letter.

The learned Chancellor does not express as I understand it any independent opinion, but says "from this state of facts I think that the proper deduction *from authorities which bind me is, that the mortgagee cannot retain the goods or the proceeds.*"

I have endeavoured to shew why those cases have no application to one of this nature, and that the mortgage being valid between the parties, and no creditor in a position to attack it, the informality was cured by taking possession.

I am of opinion that the suit was not maintainable by this plaintiff, and that this appeal should be allowed and the action dismissed, with costs.



PATTERSON, J.A.—We have a chattel mortgage from Quinolle and Arnold to the defendant St. George, which is upon its face unobjectionable. In consideration of \$2,400 paid by the mortgagee to the mortgagors at or before the execution of the deed, the latter grants to the former the goods and chattels, redeemable on payment of the full sum of \$2,400, with eight per cent. interest, in twelve equal consecutive monthly instalments, with interest on the principal from time to time remaining unpaid, the first instalment falling due at the end of the first month from the date of the instrument. It is duly registered with an affidavit of the mortgagee that the mortgagors are justly and truly indebted to him in the sum of \$2,400 mentioned in the mortgage, and with the other statutable allegations.

When the evidence is given, however, it appears that the real transaction differs a good deal from that imported by the mortgage and stated in the affidavit. The existing debt was only \$1,600, and the other \$800 was not a debt. The mortgagors, who kept a restaurant and dealt with the mortgagee, who is a wine merchant, wanted assistance to carry on their business, and Mr. Millard, who was conducting the mortgagor's business, promised that the mortgagee would advance them \$800. From Mr. Millard's evidence it does not appear that the promise, which was verbal, was very definite; but from what is said, and what was afterwards done, it was I have no doubt understood that the advances were to be made as required for the business, and it was probably contemplated that a considerable part would be in goods. In fact only a small portion was advanced. The business came to a close five or six weeks after the mortgage was made, when the mortgagors made the assignment to the defendant Clarkson.

It was necessarily a term of the agreement, though it may not have been put in words by Mr. Millard, that the advances, which were promised to enable the business to continue, were not to be made if the business ceased. That term was recognized and acted on. The mortgagee

was not bound, at all events, to advance the money, notwithstanding that the security he took assumed it to be already advanced.

In consequence of the differences of opinion which have appeared in one or two cases, and the discussion of the subject in this case, I have given all the consideration in my power to the question of the true construction of the Chattel Mortgages Act in the particular which we have now to decide. The policy of the Act, I have no doubt, is, to require notice to be given, by the registration of an instrument, of the real state of the title to goods, or the amount and nature of incumbrances on them, when they remain in possession of the person who has parted with his title or created the incumbrances. I had occasion to give a good deal of attention to this topic, in *Carlisle v. Tait*, 7 A. R. 10, where one question was, whether a person who had bought the mortgaged goods from the mortgagee, the mortgagor still retaining possession of them, was bound for his own protection against the creditors of the mortgagor to refile the mortgage, with a statement of his interest in the goods, before the expiration of the year.

I thought that the policy of the Act clearly required him to do so, and that he was brought within the letter of it for reasons which I attempted, at some length, to explain, and the general purport of which may, not inaptly, be condensed into an expression which I find printed in italics in the judgment of Lord Campbell, in *Doe Baddeley v. Massey*, 17 Q. B. 373, that *although he was not entitled to the mortgage, he claimed under the mortgage*.

The other members of the Court who heard the appeal in *Carlisle v. Tait* took a different view of the application of the statute to the facts. It is, therefore, possible that any bearing which that decision may have on the principle involved in the present inquiry may be rather in favour of than against the validity of the mortgage before us. Its bearing is, however, remote. I refer to the case because I retain the opinion I formed and expressed concerning the policy of the statute, and think we should apply it to the

construction of the first and second sections, which are those now in question.

We cannot, in my opinion, hold that the statute is satisfied by registering an instrument with the accompanying affidavits complying in their form and statements with all that is prescribed, while the instrument sets out a different transaction from the real one, and the affidavits are untrue, without shutting our eyes to the evidences of the intention of the Legislature apparent from the general tenor of the statute. The principle of construction which I think the correct one is enforced by Mr. Justice Armour in his judgment in *Hamilton v. Harrison*, 46 U. C. R. 127.

We have a key to it in these sections 1 and 2.

The first section authorizes an agent to make an affidavit *if he is aware of all the circumstances* connected with the transaction, and is authorized in writing to take the mortgage.

This seems a very direct indication that the affidavit required is a true affidavit.

The other provisions, all of which are *in pari materiâ* afford equally express indications that the instruments are to state the real transaction. Thus section 5 requires it to be sworn that the consideration for a sale is that which is set forth in the conveyance; and section 6 is equally clear as to agreements for future advances, and the extent of liability to be incurred by indorsing, and as to the necessity, when an agent acts for the mortgagee, that he shall be aware of the circumstances.

The intention that the real amount of incumbrance on goods of which the mortgagor retains possession shall be stated, is again made very manifest by the requirement of the details of the account, under section 10, when a mortgage is refilled. Take the present mortgage as an example, and suppose that during the first year of its currency no part of the \$800 had been advanced, while the real debt of \$1600 had been paid off. The payments might be truly stated under section 10, and an account exhibited shewing \$800 still due as a debt, which would be altogether fictitious.

I am not supposing fraud, which of course gives rise to other considerations, but some innocent mistake, if under the circumstances such a thing would be possible; as if, for example, the agent who made the account and swore to it was not correctly informed of the facts.

It would be making the statute of little use to hold that in such a case it was complied with.

The mortgage before us being, to the extent of the \$800, a security for future advances for the purpose of enabling the borrowers to carry on business with such advances, comes within section 6, and is, I think, vitiated as against creditors for want of compliance with what is there required; but I do not stay to discuss that section, because in my opinion the misstatement of the debt is fatal under the earlier sections.

When we hold that the debt mentioned in the mortgage and in the affidavit must really exist before the first and second sections can be complied with, it does not follow that we are to test its existence by the rigid rules which were appropriate in the common law action of debt.

To adopt language once used with reference to a different subject by Lord Stowell (*The Reward*, 2 Dodson, 269, 270), "the Court is not bound to a strictness at once harsh and pedantic in the application of statutes."

But the extent of the incumbrance must appear with substantial accuracy.

As I understand the course of decision upon the statute, the views I have expressed are those which have been generally, if not invariably, acted upon.

*Robinson v. Paterson*, 18 U. C. R. 55, is an express decision against the validity of a mortgage like this, and I think it correctly interpreted the statute.

In *Walker v. Niles*, 18 Gr. 210, a part of the debt was created by a promissory note given by the mortgagee to the mortgagor, which the latter accepted as cash. This circumstance, in the opinion of Mowat, V. C., distinguished the case from *Robinson v. Paterson*, the transaction being, as he found it to be, honest and *bonâ fide*. That decision



was approved in this Court in *Jaffray v. Robinson*, 46 U. C. R. 132, note.

But the decision in *Walker v. Niles* can scarcely be said to have involved the liberality of construction which, as I have suggested, may be admissible in deciding what may properly be described as a debt for the purpose of this statute; because a *bonâ fide* promise to pay money in consideration of a promissory note given by the promisee is not *nudum pactum*. It is a promise to pay for a consideration which was described by Parke, B., in *Simon v. Lloyd*, 2 C. M. & R. 187, as "in consideration of receiving an authority to use the defendant's name for a certain amount during the period of two months."

The more liberal treatment of the statute is illustrated by two of the earliest cases which were decided under it,—*Baldwin v. Benjamin*, 16 U. C. R. 52, and *Brodie v. Ruttan*, 16 U. C. R. 207.

In *Baldwin v. Benjamin*, which was decided before the Chattel Mortgages Act was cast in its present form, it was held that a security which might be given at common law, such as, in that case, a chattel mortgage to secure against a contingent liability undertaken for the mortgagor, might still be given; and that if the affidavit prescribed by the statute could not truly be made with respect to such a mortgage, the conclusion was, not that the mortgage was invalid, but that it was not within the statute, and did not require registration; but, with the liberality to which I have alluded, it was also held that the affidavit that the mortgagor was justly and truly indebted, &c., could be properly made.

In *Brodie v. Ruttan*, 16 U. C. R. 207, the treasurer of a Mutual Insurance Company took a mortgage to himself for a debt due to the company, and made the statutory affidavit. This was supported. The principle of these cases is as applicable under the present law as under the statutes in force when they were decided, so far as the question of construction touching the nature of the debt is concerned. Whether the other point touched in *Baldwin v. Benjamin*

may not have been affected by the change in the law respecting future advances and indorsements may perhaps be debatable.

But the liberality exemplified in these two cases, which I believe go as far as any others in that direction, does not extend to condoning a substantial mis-statement of the incumbrance on the property, or of the consideration for a conveyance of it; nor do they at all conflict with the judgment of the same Court in *Robinson v. Paterson*, 18 U. C. R. 55.

When the fifth section of the Act requires an affidavit "that the sale is *bonâ fide*, and for good consideration as set forth in the said conveyance," I am not able to understand how we can give it "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent meaning and spirit," (a) while we hold that it does not require the true consideration to be expressed, unless the intent and object is not what I have stated I suppose it to be; and I take the enactment of the second section to amount as plainly to a declaration that when a mortgage is given for a debt, the true debt must be mentioned in it.

I agree, therefore, with the learned Chancellor, that this mortgage is void against the creditors of Quinolle and Arnold; and I pass on to consider the other objections taken to the decree.

One objection to the plaintiff's right to maintain the action was founded upon the prayer in which the plaintiff, while he prays for judgment and execution for his debt, does not in terms assert a right to take the goods under his execution, but concedes to Clarkson the assignee the right to take them for distribution amongst all the creditors. The argument is, that the plaintiff cannot come into Court to ask to have the conveyance set aside, unless he is or is about to become entitled to seize the goods. This objection, as far as it is founded on the plaintiff's pleading,

(a) See R. S. O. ch. 1, sec. 8, No. 38.

is in the nature of a demurrer. But it does not follow that because the plaintiff asks, as one branch of his prayer, that the whole of the goods may be handed over to the assignee, and submits in that case to share ratably with the other creditors, he abandons his right to have the goods taken in execution to make the amount of his own debt, if the Court shall hold that to be the appropriate relief. The demurrer therefore ought not to prevail.

The appropriate relief is in my opinion the simple removal of the mortgage out of the way of the plaintiff's execution, with perhaps a declaration, *quantum valeat*, in the interest of the creditors generally, that the mortgage is, in the words of chapter 119, "absolutely null and void as against creditors of the mortgagor."

It was, many years ago, decided in *McMaster v. Clare*, 7 Gr. 550, and is undoubted law, that an assignee like the defendant Clarkson, who takes only under a voluntary deed of the debtor, and has no such status as an assignee in bankruptcy, can assert no rights which his assignor had parted with before the assignment. Clarkson's only right in these goods is the equity of redemption.

The judgment of the learned Chancellor on this point is thus expressed :

"The assignee, Clarkson, took only the equity of redemption under the voluntary assignment to him, the mortgage being valid as between the parties to it and volunteers under them. He, therefore, could not attack the mortgage as representing creditors, although an assignee in insolvency might do so: *Re Andrews*, 2 A. R. 24. This assignment intervenes between the judgment and award of execution now given in favour of Park against Quinolle and Arnold, and the mortgagee, so that the effect of declaring the mortgage invalid is to allow the goods covered by it to fall into the general assignment for the benefit of all the creditors. *Richards v. James*, L. R. 2 Q. B. 285. This, indeed, is what is asked by the plaintiff, and I give judgment in that form with costs to the plaintiff."

The fallacy which seems to me to govern this finding is in treating the avoidance of the mortgage as giving to the

assignment a larger effect than an assignment of the equity of redemption.

The case of *Richards v. James*, L. R. 2 Q. B. 285, does not, as I read it, support the proposition for which it is cited.

James gave a bill of sale to Spark, dated April 12, 1864, which Spark did not register pursuant to 17 & 18 Vict. ch. 36. On April 21st he gave another bill of sale of the same property to Hollingsworth, which was promptly registered. On May 9th Spark took from James another bill of sale of the same goods for the same consideration as his former unregistered one, and he duly registered the new one. The goods were seized under writs of *fi fa.* on the 11th and 14th May. On interpleader proceedings the creditors were barred, and the proceeds of the goods, which had been sold, were ordered to be paid, first in satisfaction of Hollingsworth's claim, and the balance to Spark. But Spark's first bill of sale, though void against the creditors for want of registration, was good against Hollingsworth, and the contest arose on his contention that he ought to be paid in full before Hollingsworth was paid anything, inasmuch as the claims of the creditors were out of the way. This contention did not succeed. The judgment of the Court was delivered by Lush, J., who, after stating the facts, continued thus: "What, then, is the consequence of avoiding a bill of sale by an execution? Is it to displace the security altogether, or is it only to neutralize it so far as it affects the interest of the execution creditors, and to leave it operative as to all other interests? We are of opinion that the consequence is to displace it altogether, and that in no other way can due effect be given to the statute." Then after pointing out that the effect of the contention would be to make Spark's bill of sale valid as against the execution creditors, because it would enable him by means of it to get the goods which, as against him, the execution creditors were entitled to keep, he said: "We should, therefore, even if there had been no decisions bear-



ing on the point, have been of opinion that Hollingsworth was entitled to priority. But we find abundant authority for this conclusion in the cases decided upon the analogous Act of the 13 Eliz. ch. 5. Many of them are cited and commented on in *Roberts on Fraudulent Conveyances*, ch. 5, p. 591, and they are summed up by Vice-Chancellor Kindersley, in *Hue v. French*, 26 L. J. Ch. 317, where he says: 'The manner in which Courts of Equity construe that statute is, that the instrument by which a debtor makes a voluntary assignment is (assuming it to be fraudulent as against creditors) to be regarded as if it had never existed.' The same doctrine was propounded by this Court in *Shears v. Rogers*, 3 B. & Ad. 362."

Now it appears to me that the same reasoning which would make that case an authority for holding the mortgage void as against the debtor's assignee, because void as against creditors, would make it void as against Quinolle and Arnold themselves, if there had been no assignment.

The decision is not that the bill of sale was *void* altogether, but that being avoided by the execution it was *displaced* for all purposes of working out the object of the statute, which gave Hollingsworth the benefit of his diligence in registering his bill of sale against Spark, who neglected to do what was necessary to preserve his priority to the executions.

The case cited as *Hue v. French*, from 26 L. J. appears elsewhere as *French v. French*, and as *Shee v. French*, 1 Jur. N. S. 840 before Stuart, V. C.: 6 D. M. & G. 90 before Lord Cranworth: and 3 Drew. 716: 3 Jur. N. S. 428 before Kindersley, V. C. The Lord Chancellor had decided that an annuity secured to the widow of a tradesman, as part of the consideration for the sale by him of his stock-in-trade and goodwill, was void under 13 Eliz. ch. 5, and was an asset for the payment of his debts; and Kindersley, V. C., had to deal with the question whether it was a legal or an equitable asset. In deciding that it was the former he used the language quoted by Lush, J., and also referred to the case of *Shears v. Rogers*. That was an

action against an executor upon a bond made by his testators, in which it was held that a lease which the testator had assigned by a deed void under the statute 13 Eliz. ch. 5, was an asset in the hands of the executor for the payment of debts. Lord Tenterden said: "The authorities shew that whenever a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession with respect to the claim of the creditors, and the goods are assets in the hands of the executor."

The effect of the decisions is thus put in *Kerr on Frauds*, 2nd ed. p. 176: "As between the parties themselves and all persons claiming under them in privity of estate, voluntary conveyances are binding; but in so far as they have the effect of delaying, defrauding or deceiving creditors, voluntary conveyances are not *bonâ fide*, and are void as against creditors to the extent to which it may be necessary to deal with the property for their satisfaction. To this extent, and to this extent only, they will be treated as if they had not been made. To every other purpose they are good, unless the transaction is so tainted with fraud as to necessitate its avoidance in toto so as to work justice between the parties."

I hold, therefore, that the defendant Clarkson must be treated as claiming only under Quinolle and Arnold, and as not representing the creditors except so far as he holds in trust for them the equity of redemption which passed to him by the assignment.

In other respects I think the action is proper and the decree correct.

We may look, I suppose, to the case of *Reese River Silver Mining Co. v. Atwell*, L. R. 7 Eq. 347, for the principle on which the action is brought, so far as it attacks the conveyance.

That case was decided in 1869, while the distinction still existed between courts of common law and courts of equity; and while, in cases like the one now in appeal, a court of equity acted only in aid of the legal right, and,

whenever a judgment of a court of common law had to be enforced would decline to give equitable execution, or even to interfere to set aside a fraudulent conveyance, unless a *fi. fa.* or *elegit*, as the case required, had been issued from the common law court: *Smith v. Hurst*, 1 Collyer 705; 10 Hare 30; *McMaster v. Clare*, 7 Gr. 550; *Whiting v. Lawrason*, 7 Gr. 603; *Ferguson v. Kilty*, 10 Gr. 102, 106.

The English statute, 1 & 2 Vict. ch. 110 (which was partly adopted in our statute respecting the registration of judgments, 13 & 14 Vic. ch. 63, which ceased in 1861 under 24 Vic. ch. 41), amongst many other provisions, declared orders of courts of equity for the payment of money to have the same effect as judgments of superior courts of common law, and empowered courts of equity in certain cases to make charging orders.

In the *Reese River Silver Mining Co. v. Atwell*, an order had been made in Chancery for the defendant Atwell to pay £6,000 to the plaintiffs or their official liquidator, and the bill was filed to set aside a settlement made while the proceedings to obtain that order were pending. It was objected that no charging order had been made; but Lord Romilly, M. R., held that a charging order was not necessary, and referred to *Goldsmith v. Russell*, 5 D. M. & G. 547, where Lord Cranworth, C., had overruled a similar objection. Then he stated the principle thus: "As soon as the Court finds that a deed has been executed for the purpose of delaying, hindering or defrauding creditors, and that it comes within the statute [13 Eliz. ch. 5]; it sets the deed aside, but it goes no further; and the plaintiffs must take some independent proceedings if they wish to have execution against the property in this deed."

No question arose, as I understand the case, similar to that in *Smith v. Hurst*, or *McMaster v. Clare*, because all the proceedings were in equity, and there was no question of aiding a merely legal right. In this respect there is an analogy between the case and one brought under our present system in which the different jurisdictions are

united. The case does not go the length of deciding that a bill like this could be maintained by a creditor who had not only stopped short of execution, but had not even begun an action against his debtor. I believe, however, that since *Longeway v. Mitchell*, 17 Gr. 190, was decided, that has not, with us, been considered an objection; and under the present jurisdiction of the High Court of Justice, I see no good reason why a creditor may not, as in the case before us, proceed in the one action to obtain judgment and execution, and to have a fraudulent deed, or one declared void by statute, removed out of his way. The policy of the Judicature Act is in favor of making the one action serve the purpose.

All the reported cases of the class of the *Reese River Silver Mining Co. v. Atwell* and *Longeway v. Mitchell* related to deeds which were attacked under the statute 13 Eliz. 5 or under our analogous statute R. S. O. ch. 118. Under those statutes the vice of the deed lies in the intent, and there is no power to cure the defect by making another deed with the same intent.

The cause for which a deed is avoided under chapter 119 is very different, and a defect which vitiates a deed under that statute is easily cured so long as no creditor has acquired a right to seize the goods, and no subsequent purchaser or mortgagee has intervened. A new affidavit, or if necessary a new deed, or a delivery and change of possession operating as a conveyance which the statute does not interfere with, will effectually take the goods out of the reach of the creditors, or of the future purchaser. An instance of this occurred in the transactions detailed in the case of *James v. Richards*, L. R. 2 Q. B. 285, to which I have referred; and I observe another in *ex parte Allan*, in *re Murray*, in Q. B. D., noted in the *Weekly Notes* for 1884, at p. 211.

It is therefore unlikely that any creditor would venture to bring an action to set aside such a deed, the first effect of which would be, by calling attention to the defect, to lead to its prompt removal, or the substitution of a more effectual conveyance.



But when, as in the present case, it was impossible for the debtors to give a better title, in consequence of the assignment to Clarkson, and also by reason of chapter 118, which, though not held to have been offended against by this mortgage, would have stood in the way of a similar transfer after their embarrassments became more pressing, the position of the mortgagee who had taken possession, but who had no title except under his mortgage, did not differ from that of a person whose deed was bad as against creditors under one of the other statutes.

We are given to understand that the goods now in question have been sold, and the money set aside to abide the result of this litigation. The position is therefore the same as if the goods remained *in specie* in the hands of the mortgagee; and there is no question before us such as may possibly arise when, before any action taken by a creditor, a mortgagee may have sold the goods. When such a case arises it may be necessary to consider how far the doctrines apply which were enunciated by Mowat, V.C., in *Totten v. Douglas*, 18 Gr., at p. 366, and acted on by him in one or two cases reported in the same volume, and apparently by Lord Romilly, M. R., in *Cornish v. Clark*, L. R. 14 Eq. 184.

I think the appeal should be dismissed, and the plaintiff's costs of the appeal paid by the defendant St. George; and that the decree should be varied by striking out of it the 5th and 6th paragraphs, and all of the third paragraph but the preamble or recital, and substituting for the part of the 3rd paragraph so struck out an order that the defendant St. George pay out of the proceeds of the goods to the plaintiff the sum of \$101.94, awarded to him in the first paragraph, with interest from the date of the decree.

The other defendants should bear their own costs of the appeal.

I think also that the word "fraudulent," which is not used in section 4 of the Chattel Mortgage Act, but which has, by inadvertence, been introduced into the second paragraph of the decree, should be replaced by the statutory expression "absolutely null."

OSLER, J. A.—The material facts may be shortly stated.

The defendants Quinolle and Arnold on the 24th January, 1882, being indebted to the defendant St. George in \$1576, and being desirous of obtaining further advances in money and goods, which he was unwilling to make except upon the terms of getting security for his whole claim, executed a chattel mortgage in his favour securing the sum of \$2,400 upon the whole of their stock. \$800 of this amount represented the sum which St. George agreed to lend them, and which, though it assumed the shape of a present loan, was to be paid out from time to time as they required it. The amount thus secured was to be repaid in twelve monthly instalments of \$200 each, with interest at eight per cent.

The mortgage contained provisoes that until default the mortgagors should have the quiet possession and use of the goods, and that if they should attempt to sell or dispose of, or part with the possession of them, it should be lawful for the mortgagee to seize them.

Neither the mortgage nor affidavit of *bona fides* recites any agreement to make the advances. The affidavit was in the usual form.

The mortgage was duly registered.

On the 3rd of March following, the mortgagors made an assignment for the benefit of their creditors generally to the defendant Clarkson, of all their goods and stock in trade, including the goods embraced in the mortgage, but not expressed to be subject to the mortgage.

It was executed by the assignors and assignee and by certain creditors, and the assignee took possession of the goods.

On the 11th March, the defendant St. George, treating the assignment as a breach of the covenant in the mortgage against the disposing of the goods, took them out of Clarkson's possession with his assent, removed them to his own premises, and advertised them for sale under his mortgage.

On the 4th April the plaintiff brought this action to restrain the sale, and claimed by his statement of claim, (1) That the Court should declare the chattel mortgage void and invalid as being contrary to the provisions of the statute 13 Elizabeth ch. 5, and the R. S. O. ch. 118, and also in not complying with the Act respecting mortgages and sales of personal property and the amendments thereto. (2) And that the defendant, St. George, might be ordered to deliver up possession of the goods to the defendant Clarkson, the assignee, to be disposed of and the proceeds applied in payment of the claims of all the creditors of Quinolle and Arnold as provided for by the terms of the trust deed to him.

I think the agreement between the mortgagors and mortgagee may be looked upon as being really one for a present advance, though the amount was to be paid out to the former as they required it; and it therefore was not necessary that it should be set forth in the mortgage under the sixth section of the Chattel Mortgage Act.

All the requirements of the Act as regards the affidavits of execution and *bona fides*, and registration have been complied with. Therefore, as the instrument is not void as contravening the Act, the first question is, whether, apart from the Act, it is void on the ground of actual fraud.

Conceding that where it is shewn that the whole sum apparently secured has not been really advanced, the most rigid scrutiny is to be made into the facts, and that where they are equivocal the inference should be unfavourable, I think the evidence in the present case displaces any presumption of fraud, and establishes, as the learned Chancellor has found, the *bona fides* of the transaction beyond reasonable cavil.

In addition to the cases cited by my Lord, I may refer to *Biddulph v. Gould*, Q. B. 11 W. R. 852, decided in 1863, in which it was held that the insertion in a bill of sale, knowingly, of a wrong sum, did not necessarily invalidate the security against creditors, if it was done without fraud and with the intention of making the security available

only to the extent of the sum actually due. Unless, therefore, we are prepared to overrule these authorities, to which I may add the unreported case of *Jaffray v. Richardson*, in this Court, referred to in *Hamilton v. Harrison*, 46 U. C. R. 127, which is difficult to reconcile with *Robinson v. Paterson*, 18 U. C. R. 55, we must sustain the mortgage.

The case might be disposed of on this ground, but some important questions have been argued with regard to the *status* of the plaintiff to maintain the action, which ought not to be passed over.

The mortgage is not void under the Statute of Elizabeth, or under the Fraudulent Preference Act, R. S. O. ch. 118. It can only be attacked, if at all, as being void for non-compliance with the requirements of the Chattel Mortgage Act, R. S. O. ch. 119.

If the action can be maintained on that ground, it must be by analogy to the *Reese River Mining Co. v. Atwell*, L. R. 7 Eq. 347, and cases of that class; and in the way the plaintiff has framed it, viz.: as an action on behalf of himself and all the creditors of the mortgagors; for, not having recovered judgment and execution, he can only sue in a representative capacity. That is the only measure of relief the plaintiff asks or can ask; the rule was not impeached on either of the arguments of this appeal and seems to be firmly established by numerous authorities. Some of the more recent instances of its application are to be found in *Morphy v. Wilson*, 27 Gr. 1; *Campbell v. Campbell*, 29 Gr. 252, and *Collver v. Swayze*, 26 Gr. 395, in which last case the origin and reason of the rule was very fully examined by my Brother Proudfoot. There is nothing in the Judicature Act that I am aware of which affects this mode of procedure, and that seems to have been the opinion of the present Chancellor in the case of *Campbell v. Campbell*, *supra*.

Apart, however, from this consideration, there is one which lies at the root of the action, and that is whether a creditor can, before obtaining judgment and execution,



set aside or impeach an instrument which is not void for fraud, but which merely does not comply with the provisions of the Chattel Mortgage Act in non-registration, non-renewal, or in some other respect, and which therefore would not be good against a creditor coming with an execution or other process, such as an attachment, which he could actually lay upon the goods.

I think it can make no possible difference in point of principle that the mortgagor has disposed of his equity of redemption. If such an action lies it must be because the creditor is entitled, not only to a decree setting aside the instrument, but also to restrain any disposition of the property, and to hold it as it were *in medio*, until he is in a position to reach it with an execution ; for if he had an execution he did not need the assistance of the Court. I say the plaintiff's right must be put as high as that, because, if it is not, either the debtor or mortgagor must remain at liberty to dispose of the property, or, if he has parted with his equity of redemption it must "fall into the assignment," as it has been expressed, or enure to the benefit of the subsequent purchaser or mortgagee of that equity. If the security is set aside or displaced altogether, then, unless *eo instanti* there is some one who acquires a lien on or title to the goods by the very proceeding by which that is done, they either remain in the debtor, in which case no difficulty arises, or in the assignee, who would thus come in before any execution or process in the action. We may suppose the case of an action like this brought while the goods remain in possession of the mortgagor, (a much stronger case than the present), and pending the action another mortgage given by him. If the first is set aside as against the creditor he still finds the second interposed between him and any lien or execution he can possibly obtain against the goods, and here there was an assignment not revocable, having been assented to by creditors, and therefore not void, made before the commencement of the action.

Assuming that the action lies, and that the mortgage may be set aside by a creditor who can never be in a position to lay on an execution, I do not think that any fault can be found with the Chancellor's judgment in displacing the mortgage or treating it as non-existent according to the view in *Richards v. James*, 2 Q. B. D. 285, and *Hue v. French*, and *French v. French*, there cited, thus leaving the whole property to fall into the assignment and to be administered for the benefit of all the creditors. I have not found any authority for saying that in such circumstances the creditor who brings the action can, as it were, step into the position of the displaced security and enforce his claim against the interest which was embraced in it. His execution must be levied upon the goods of the execution debtor, not upon those of the assignee or second mortgagee which the goods in question are, when the execution comes in.

The case of *Richards v. James*, cannot, however, be said to be a satisfactory one.

The accuracy of the construction placed by it upon the first section of the Bills of Sales Act, 1854, has been doubted, and with much reason: see *In re Blaiberg, Ex parte Toomer*, 23 Ch. D. 254, and the cases there cited; and it cannot be treated as giving much support to the notion that though the creditor is, in the circumstances, unable to procure execution for his individual debt, he may, nevertheless, avoid the mortgage for the benefit of the assignee, and thus indirectly for the benefit of creditors generally.

I think the authorities do not leave it open to be argued that such an assignee as the defendant Clarkson can attack the chattel mortgage. The cases of *Re Barrett*, 5 A. R. 206, and *Re Andrews*, 2 A. R. 24, relate to the supposed right of an assignee in insolvency under the late Insolvent Act, and have no application here.

It is unnecessary to say more about these decisions than that they may have to be reconsidered if it should be attempted hereafter to apply them to a new Insolvent Act,

which does not more clearly define the rights of an official assignee than the late one did: see *Smith v. Merchants' Bank*, 8 S. C. R., per Strong, J., p. 532, and per Taschereau, J., at p. 543.

I am, however, of opinion that the action is altogether misconceived, and that there is a broad distinction between cases like *The Reese River Mining Co. v. Atwell*, L. R. 7 Eq. 347, where the Court intervenes on the ground of fraud, and the case before us. This distinction I find well expressed by the learned Chancellor himself in the case of *Campbell v. Campbell*, 29 Gr. 252.

“Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property, then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance until the plaintiff can obtain a declaration of its invalidity and a recovery of judgment for the amount claimed.”

In *Hepburn v. Patton*, 20 Gr. 597, the late Chief Justice of this Court, when Chancellor, in dissolving an injunction which had been obtained by a creditor restraining his debtor from selling or otherwise disposing of certain property, said: “There is no practice, and I think no sound reason for restraining a debtor from dealing with his chattel property at the instance of a plaintiff alleging himself to be a creditor, but who is not in a position to ask for a decree establishing his debt against him.”

And in *Robinson v. Pickering*, 16 Ch. D. 660, it was held that the Court would not, before the creditor had established his right by obtaining a judgment, restrain a married woman from dealing with her separate estate though it was the identical property on the faith of which the debt had been contracted.

If it be conceded, as it undoubtedly must, that this mortgage was valid between the parties, it appears to follow from these authorities that until an execution or

attachment comes in which binds the goods, and under which they may be seized, the debtor or mortgagor or mortgagee are at liberty to deal with them to the full extent of their respective interests. The debtor may sell or mortgage them. If he had already mortgaged them, he may mortgage, or sell, or assign his equity of redemption, and subject or not to the first mortgage.

The mortgagee might take possession either adversely to the mortgagor or his assignee, or as in this case with his assent, and he could sell the goods and convey a good title to the purchaser, just as the debtor might have done if there had been no mortgage at all: *Morewood v. South Yorkshire R. W. Co.*, 3 H. & N. 798.

I may summarize my views thus : I think the plaintiff cannot avoid the chattel mortgage, not being an execution or attaching creditor.

If he could do so by this mode of proceeding, the assignee would nevertheless come in before him ; if *Richards v. James* is right. If that case is not right, still he cannot maintain the action, because the instrument can only be avoided for the purpose of giving him some effectual relief against the goods, and this he cannot obtain because of the position of the assignee.

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## BELL V. RIDDELL.

*Stifling prosecution—Promissory note—Illegal consideration.*

The defendant R. having been charged with misapplying fines paid into his hands as a justice of the peace, and proceedings instituted against him in respect thereof, the plaintiff, pending an investigation of the charge, volunteered his aid to assist R. in effecting a settlement of the amount claimed by the municipality, which he undertook to discharge upon the defendant R. giving his promissory note for the amount, indorsed by his wife. The plaintiff thereupon settled the amount claimed by giving his note therefor, which he alleged he had subsequently paid, and the defendants joined in a promissory note in the manner proposed by the plaintiff.

*Held* [affirming the judgment of the Court below, 2 O. R. 25], that the transaction in effect amounted to a compromise of a criminal charge, and therefore that plaintiff was not entitled to recover on the note given by the defendant.

THIS was an appeal from a judgment of the Queen's Bench Division, pronounced on the 30th of December, 1882, whereby a motion made in this cause, on behalf of the plaintiff, during the Michaelmas Sittings of the Divisional Court, for an order for the entry of judgment for the (appellant) plaintiff, against the defendant Catharine Riddell, was dismissed; and a motion made at the same time on behalf of the defendant James Riddell for an order dismissing the action against him was granted; and it was ordered that judgment should be entered for both defendants, with costs, and that the action should be dismissed with costs.

The facts giving rise to the action are fully stated in the report of the case in the Court below (2 O. R. 25). and in the judgment.

The appeal came on to be heard before this Court on the 5th of September, 1884.\*

*Osler*, Q. C., and *Plumb*, for the appellant. Even if the appellant was a party to the alleged improper dealing with the municipality, there can be no question that the municipality had a perfect right to press their claim, and the

\**Present*.—PATTERSON and OSLER, JJ. A., GALT and ROSE, JJ.

settlement which was effected was one that should be sustained.

The authorities of the municipality had no power and did not undertake to settle the criminal charge. The evidence shews that the defendant James Riddell remained in custody, and was brought up for trial before a Court of competent jurisdiction, and the prosecution placed in the hands of the County Crown Attorney. The township authorities can not be held responsible for the result of the criminal charge: *Fisher v. Apollinaris Co.*, L. R. 10 Chy. 297. Admitting that the transaction with the township was void on the ground of public policy, still, as the appellant was not a party to it, and was simply in the position of a banker lending money, used thereafter, but not by him, for an illegal purpose, he cannot be affected thereby. It is in evidence that the appellant has paid the note to the municipality, and under the circumstances the sum paid must be treated as money paid at the request of the defendants, and therefore recoverable from them.

As to the female defendant, it is contended that, by indorsing the promissory note, she is estopped from denying that she had separate estate, out of which this debt may be recovered: *In re Shaver*, 3 Chy. Ch. 379.

But however that may be, the evidence sufficiently shews that she is so possessed. The estate now vested in her became so vested on the 5th of October, 1878. The property is shewn to have been under lease, and the rents would be separate estate, against which the appellant would be entitled to have judgment: *Horner v. Kerr*, 6 A. R. 30.

*Falconbridge*, for the defendants. The sole and only consideration for the note sued on was the stifling of the prosecution against defendant Riddell by the township, and the intervention of plaintiff, and the mock trial of Riddell, were merely colourable, and cannot validate the transaction. It is not proved that the plaintiff actually paid the note to the township, but even if he had done so, he was fully cognizant of, and a party to, the whole transaction from the commencement, and this payment of his

note was purely voluntary, and cannot place him in any better position as regards the defendants. It cannot be held that any estoppel is created by the indorsement on the note, if in point of fact she had not separate estate; and in any event she would be entitled to relief against this note on the ground of undue and improper influence and pressure exercised to induce her to indorse: *Griffin v. Patterson*, 45 U. C. R. 536; *Johnston v. White*, 40 U. C. R. 309; *Lawson v. Laidlaw*, 3 A. R., at p. 90.

October 15th, 1884. PATTERSON, J. A.—I am clearly of opinion that we cannot do otherwise than dismiss this appeal.

To give reasons for this conclusion would be to repeat what my brother Osler has said in the judgment which he has prepared, and to which I have nothing to add.

But the case has been presented to us in the printed appeal book in a manner not entirely satisfactory, owing perhaps to counsel who acted at the trial being, or supposing that they were, so familiar with the facts as to make it unimportant to prove some of them by witnesses who were examined, and who could have spoken of them from their own knowledge. Doubtless from this cause it is that the learned Judge who tried the action speaks of the plaintiff having paid the note he gave the Reeve of the Township, although no such fact is stated by the plaintiff himself or any other witness. Indeed, it is only from what seems almost a chance statement of one witness that we learn that the plaintiff had given a note, and we are entirely uninformed as to when it was payable, or any other particulars except its amount. It must also have been from this same cause, or from a too ready assumption of facts by counsel without close attention to the evidence, that the learned Judge was led to apprehend that the \$540 for which the plaintiff had given his note was an amount for which the defendant James Riddell was liable to the township; whereas it was not proved with certainty that he owed any amount, and he did not in terms admit any

liability, and it was distinctly shewn that a large proportion of the \$540 was money for which there was no pretence that he was legally liable.

Under these circumstances I think it right to say that my opinion is now given only upon the case presented by the pleadings, namely, the claim to enforce the promissory note made by the two defendants; and by the evidence which does not shew that the plaintiff paid any money to the township, or, in case he did really pay his note, does not shew what part or that any part of it was for a debt due by James Riddell to the township.

If the plaintiff did discharge James Riddell's debt, and were to sue him for money paid to his use, questions touching his right to recover, when the motive in making the payment was to stifle the prosecution, would arise, which are not at present properly before us, and which have not been argued.

Upon those questions I venture no opinion at present. It might be found that the same principles which prevent his enforcing the security now sought to be enforced would be obstacles in the way of his recovering even money paid in discharge of an existing liability of Riddell's; but that could only be decided after considering several matters which are outside of the case we are dealing with. Some of these are suggested by observations of one or two of the Lords Justices in *Flowers v. Sadler*, 10 Q. B. D. 572, which seem to put the doctrines touching the suspension of civil remedies and the obligation to prosecute for crime on a less rigid footing than as explained in *Wells v. Abrahams*, L. R. 6 Q. B. 554, and the cases there discussed. Then there would be the consideration how far, in suing for money paid to the use of Riddell, the plaintiff would have to resort to the illegal contract, or whether it would not be Riddell who would be driven to set it up. *Taylor v. Bowers*, 1 Q. B. D. 291, is the latest case in which I have seen that subject touched upon. These are some of the topics that would require careful consideration. There are others also, on both sides of the question. I now



allude to them for the purpose I have mentioned, namely, to guard myself from being supposed to have at present formed any opinion of their bearing upon facts which may possibly be susceptible of proof, but which are not those now before us.

GALT, J.—I have had an opportunity of perusing the judgment of my Brother Osler; and, for the reasons stated by him, I concur in the opinion that this appeal should be dismissed.

OSLER, J. A.—I am of opinion that the appeal fails. The case is this:—The defendant James Riddell had been arrested and was in custody at the instance and on the information of the Reeve of the Township of Woodhouse, on a charge of embezzlement. We need not consider whether the facts would have justified the charge. Probably they would not, but it is sufficient that a prosecution was actually pending. The plaintiff knew this, and an agreement was made—we may assume at the instance of one of the defendants—between the plaintiff, the township officials, and the defendant James Riddell, that the plaintiff should give his promissory note to the township for the amount claimed by them, \$540, and that the defendants should secure or indemnify him by giving him their note for a like amount; that upon this being done the charge should be sent up for trial and the facts stated to the Court and Crown Officer, and so far as the township was concerned they would not press the case. “If the Court was willing the matter should be settled.” Accordingly the notes were then given; and on the following day the defendant James Riddell was brought before the Deputy Judge. The facts were stated, or, as the plaintiff’s solicitor, who had also been solicitor for the township, said, “The matter was explained.” No evidence was given by the prosecutors, and Riddell was acquitted.

The case may be treated as if the plaintiff had before action paid the note given by him to the township, as the

learned Judge before whom the case was tried assumed he had done, though the fact does not appear in the evidence as reported.

The question then is, whether in these circumstances the plaintiff can recover either the money so paid or upon the defendants' promissory note.

I take the rule as established by *Keir v. Leeman*, 6 Q. B. 308, and in the Exch. Ch., 9 Q. B. 371, and later authorities, to be, that an agreement which directly or indirectly has for its object the stifling of an existing prosecution for a felony, or for a misdemeanor in which the public are interested, is contrary to public policy and void. All instruments or securities given for the purpose of carrying out such an agreement are also void and cannot be enforced, and the fact that the settlement of the prosecution has the sanction of the Court is immaterial.

In *Ward v. Lloyd*, 6 M. & G. 785, the Court held that a warrant of attorney given for a debt actually due ought not to be set aside because it had been obtained by a threat of prosecution for a felony, unless it distinctly appeared that there was an agreement by the creditor, express or implied, to abstain from prosecuting on the security being given. That case was approved of and followed in *Flowers v. Sadler*, 10 Q. B. D. 572, where it was held that a security obtained by a creditor from his debtor for a debt incurred under circumstances which might render the latter liable to a criminal prosecution, was not invalid merely because there had been a *threat* by the former to take such proceedings. If there is a debt actually due, there is nothing illegal in endeavoring to obtain payment of it, and a mere threat to prosecute is not conclusive evidence of an agreement to compound a felony or stifle a prosecution. That of course is not this case, as the prosecution was here actually pending, and it is moreover very manifest that it was being made use of to extort security for a much larger sum than the township could in any circumstances have been entitled to. Indeed, it may be observed that in strictness there is no evidence that Riddell was legally indebted to the township at all.

The case of *Read v. Anderson*, 10 Q. B. D. 100-105, which has since been affirmed in appeal, 13 Q. B. D. 779, was cited, but does not assist the plaintiff. That was an action to recover money which had been paid by the plaintiff in discharge of his liability upon bets made by him for the defendant. A bet being, not illegal, but simply not enforceable by legal process, the maker may lawfully pay it. "What he may lawfully do himself he may lawfully authorize anybody else to do for him; and if by request or authority another person pays his lost bets, the amount so paid can be recovered from him as so much money paid to his use." And see *Ex parte Pyke*, 8 Ch. D. 754-757, where the distinction is pointed out between lending money to a man to enable him to bet or game with, and lending him money to pay bets which he has already made and lost.

In *Re Mapleback*, 4 Ch. D. 159, a person whose name had been forged had consented, at the request of the forger, to take up the forged paper upon condition of receiving a bill of sale to secure the advance as well as a previous debt. The advance having been made, the lender reimbursed himself out of the proceeds of a sale of the goods under the bill of sale. He was held entitled to retain the amount as against the trustee in bankruptcy of the forger.

The observations of the Lords Justices during the argument are noticeable: Bramwell, J. A., asks, "Can you take a security for money advanced to a man for the purpose of enabling him to conceal a felony, and sue on that security? Suppose the case of a brougham hired for immoral purposes, or money lent to a burglar for the purpose of buying house-breakers' tools?" James, L. J.: "It comes to this: Is a loan on purpose to enable a forger to take up a forged bill legal?"

In their judgment the Court say: "If he had been plaintiff or claimant he would certainly have been in a very difficult position. It was not compounding a felony. It might not perhaps have been strictly a misprision of felony, but it was a transaction which was intended to result, and did result, in preventing the discovery of a

felony, and in getting into the criminal's own hands the most important piece of evidence." The case was disposed of on the ground that if there had been a misdemeanour the bankrupt had been also a party to it, and his trustee could not be in a better position: *In pari delicto potior est conditio defendentis*.

The principle on which *Wilson v. Strugnell*, 14 Cox Cr. Cas. 624, 7 Q. B. D. 548, was decided is strongly against the plaintiff. A contract to indemnify bail against the consequences of the non-appearance of an accused person was there held to be contrary to public policy, and void. The accused had paid £100 to the defendant to indemnify him for becoming bail for him, and had then absconded. In an action brought by the trustee in bankruptcy of the accused to recover this sum, the Court held that as it did not appear that the liability of the defendant, as bail, had been discharged, the contract to indemnify, though illegal, remained executory, and therefore the trustee was entitled to recover. It is plain that if instead of depositing £100 in the hands of his bail to indemnify him, the accused had given his note for the same purpose, the bail could not have successfully maintained an action upon it at any time.

In *Whitmore v. Farley*, 43 L. T. N. S. 192, and in appeal 14 Cox Cr. Cas. 617, it appeared that the defendant had induced the 'plaintiff' to withdraw from a prosecution of her husband for the offence of larceny by a bailee, she agreeing to charge her separate estate with the amount taken. The action was brought to enforce performance of this contract. It was held that larceny by a bailee was a felony, but that if it had been a misdemeanor only, the agreement to charge in consideration of the withdrawal of the prosecution would have been void.

Baggallay, L. J., said, "It is immaterial whether the charge which was attempted to be compromised was a felony, or only a misdemeanor. Any agreement to compound a criminal prosecution for a public offence is illegal, and it is wholly immaterial that such an agreement has received the sanction in Court of the magistrate before



whom the charge was brought ; the sanction of the magistrate cannot render valid a transaction which would be otherwise illegal."

Lush, L. J., said, "There is certainly no legal obligation on a person who has suffered injury by the commission of a felony to prosecute the person who has committed the crime, but if he has once instituted the prosecution he has acted in behalf of the public, and cannot legally enter into an agreement to discontinue the prosecution. It is utterly immaterial whether the charge is proved or not, if once it has been made. Although the offence here was a felony, it would not matter if it were a misdemeanor. There are, no doubt, certain cases, as that of an assault, where the parties may compromise the offence without being guilty of an illegal act. But this does not apply to misdemeanors of a serious kind. Embezzlement is only a misdemeanor, yet it is a criminal offence to compromise a prosecution for embezzlement."

I may refer also to *Ex parte Critchley*, 3 D. & L. 527, where the Court held a warrant of attorney given to secure the debt, pending the prosecution of the charge of embezzlement, was void, because "it was calculated to bring the proceedings to an end, and, as far as appeared at the time, to prevent the party from being subjected to a criminal prosecution."

In the case at bar, the inference from the bare statement of facts seems irresistible, that the giving of the plaintiff's note to the township and of the defendant's note to the plaintiff were parts of one transaction or agreement, the direct object of which was to put an end to the criminal charge then pending against Riddell ; in other words, to stifle the existing prosecution. It is not necessary to assume that the plaintiff was acting in concert with the township officials in extorting a settlement from the defendant, though reasons are not wanting in support of that view. I assume his good faith, and that he paid his note to the township. But what was the consideration ? Can it be believed that it would have been given, or if

given that it would have been paid, if the prosecution of Riddell had not substantially been receded from. The proceedings before the County Court Judge were, as the Court below say, a mere device to carry out the agreement, and it is immaterial, as the case I have referred to shews, that he approved of such a settlement of the charge.

In short, the plaintiff, however ignorantly he may have done so, paid his money for what the law declares an illegal purpose, and he cannot now recover it from the defendant either on the security he took to indemnify himself, or as money paid to the defendant's use. The result might have been very different if we could have seen that there had been simply a payment by the plaintiff of the defendant's debt to the township. As I have said, no debt was proved, and the object of the payment, assuming the plaintiff's *bona fides*, was, as the evidence convinces me, the settlement of the prosecution.

It thus becomes unnecessary, as it was also unnecessary in the Court below, to determine the question which was argued as to the female defendant's ownership of separate estate.

The appeal should be dismissed, with costs.

ROSE, J.—I agree that the appeal must be dismissed.

I do not dissent from the view taken by my Brother Osler and concurred in by my Brother Galt, that even if James Riddell had owed the township the whole amount for which the note required was given, the plaintiff still must fail, as I have not been able to come to a clear conclusion on the point. It is not necessary for me to further consider it, as owing to my two learned brothers holding such view, the plaintiff could have no relief in this action.

I do not understand that it has been expressly decided that if a person owing a debt—having a criminal charge laid against him, founded upon the circumstances under which the debt was created—borrowed the money and paid the debt on the agreement by the prosecutor not to

press the charge, and such agreement were carried into effect, the person so lending the money and knowing all the facts and circumstances, and lending it to relieve the debtor from the criminal charge, could not recover from such debtor the money so lent.

I desire to leave myself free to fully consider such question, should it arise. My present inclination is, that the person so lending could not recover, as the main motive would be an illegal one, and the fact that the money thus paid discharged a debt would not relieve the person lending it from the effect of the illegal purpose. I, however, do not desire to conclude myself as to the point.

Had it been necessary to consider the right to recover against Mr. Riddell, it seems to me, among the other difficulties in the plaintiff's way, the decision in *Williams v. Bayley*, L. R. 1 H. L. 200, is not the least formidable.

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WHITE V. THE CORPORATION OF THE TOWNSHIP OF  
GOSFIELD.*Municipal drainage—Neglect to repair drain.*

A drain constructed by a municipality wholly within the limits thereof, having fallen into disrepair, the plaintiff, whose lands were injured thereby, notified the council, calling upon them to repair, which they omitted to do:—

*Held*,—affirming the judgment of the Q. B. D. (2 O. R. 287), that the plaintiff was entitled to damages in respect of his lands so injuriously affected, the result of such neglect to repair; that the case came under sec. 542, R. S. O. ch. 174; and that if it did not he would be entitled to recover under section 543, for the neglect of the statutory duty to repair as directed thereby.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division reported 2 O. R. 287, where the facts are fully stated.

The appeal came on to be heard before this Court on the 28th of October, 1884.\*

*Cassels*, Q.C. and *Falconbridge*, for the appellants.

*H. J. Scott*, Q. C., for the respondent.

The points raised and authorities cited appear in the report of the case in the Court below and in the judgment.

November 11, 1884. PATTERSON, J.A.—The facts necessary to be stated lie in a very narrow compass.

On the petition of the plaintiff and other land owners of the township of Gosfield, whose lands were to be benefited by the work, the Municipal Council, in 1873, passed a by-law, under the statutory powers contained in 36 Vict. ch. 39, sec. 2, for deepening a drain which lay wholly within the township, and did not benefit the lands of any other township. The work was done, and the plaintiff's land was drained by it; but in the course of five or six years the drain below the plaintiff's land became obstructed by earth falling in and by accumulation of grass and other

\**Present*—BURTON, PATTERSON, MORRISON, and OSLER JJ.A.



things, so that it failed to carry the water away from the plaintiff's land as effectually as before.

The plaintiff gave notice in writing to the Municipality to repair the drain. His demand was not complied with, and he brings this action for damages and for a *mandamus*,

The action was tried before the present Chief Justice of Ontario when Chief Justice of the Queen's Bench, and after consideration he gave judgment for the plaintiff for \$200 damages, awarding also a *mandamus*.

In the Divisional Court the learned Chief Justice adhered to his opinion, and Mr. Justice Armour agreed with him, but Mr. Justice Cameron dissented from their decision.

The defendants appeal to this Court.

The state of the drain and the fact that the plaintiff's land was injured by reason of it are not now in dispute.

The defendants contest the alleged duty to keep the drain in repair, and dispute their liability to this action even if they have neglected their duty.

The statutory rights and obligations of the parties during the time to which this question of repair relates, depend on the Municipal Institutions Act, R. S. O. ch. 174, and the sections chiefly in question are 542 and 543.

If section 542 applies to this drain there is no further room for argument, because it gives the right of action for damages and also the remedy by *mandamus* in express words.

The defence appears, as I gather from the discussion at the trial as reported by the short-hand reporter, to have been placed upon the ground that sec. 542 applied only to the case of drains running from one municipality to another, and that no duty was cast on the municipality to repair a drain that lay wholly within its own limits.

That argument was pressed in the Divisional Court and has been again addressed to us. It has also been contended that sec. 543, which does speak of the duty of the municipality to repair a drain like that now in question, makes it after all the duty only of the persons benefited by it, at whose expense the repairs are to be made ; and that if there

is any remedy against the municipality it may be by arbitration, under sec. 545, but that it cannot be by an action like the present.

This last proposition is advanced as a necessary or at least a legitimate implication from the express bestowal by sec. 542 of a right of action for damages and a right to a *mandamus* in respect of the drains to which that section relates, contrasted with the silence of sec. 543 on those subjects.

I am of opinion that the whole theory of the defence is based upon a misreading of the statute; and that sec. 542 applies to the drain now in question, and therefore in express terms authorizes this action.

The provisions of the Revised Statute respecting drainage, so far as anything is concerned which requires notice in the present discussion, are repetitions of similar portions of the Municipal Institutions Act of 1873, 36 Vict. ch. 48, which Act was passed, as it states, "in order to amend and consolidate the Acts respecting Municipal Institutions." The sections brought into it by way of consolidation are shewn by reference at the end of each section to the source from which they are taken, the drainage sections in which we are now interested being credited to an Act of 1872, 35 Vict. ch. 26.

There was also a Drainage Act, 36 Vict. ch. 39, passed in 1873, simultaneously with the Municipal Act of that year, which repealed the Act of 1872, but re-enacted verbatim the sections we have to refer to. Thus we had in 1873 two statutes containing, with slight exceptions, identical provisions, viz., the Drainage Act, 36 Vict. ch. 39, secs. 2 to 18, inclusive; and the Municipal Act, 36 Vict. ch. 48, secs. 447 to 463, inclusive. In the following year the 18 secs. of the Drainage Act were repealed by 37 Vict. ch. 20, sec. 6, which declared that the proceedings thereby authorized were to be thenceforth taken under the corresponding sections of the Municipal Institutions Act of 1873.

It would therefore be sufficient for us to confine our attention to the last mentioned sections, which are now

found in the R. S. O. Cap. 174, sections 529 to 545; but I think we may usefully keep the Drainage Act of 1873 before us for two reasons. One reason, which cannot be treated as of much consequence, is, that it was the form in which the law stood when the by-law was passed for the deepening of this drain, and the other is, that the provisions on which the present controversy turns, as found in sections 542 and 543, were originally included in one section. In the Drainage Act of 1873 that section was No. 17. It had been No. 16 in the Act of 1872, and when being imported from that Act into the Municipal Institutions Act of 1873 it was divided into two.

Whatever may have been the motive of the division, I am afraid its effect has been to lead to the misconception to which I attribute the present litigation. It is manifest that there was no intention to alter the law by the process of making two parts of what before had been one whole. If proof of this be necessary it will be found in the declaration, with which the Municipal Institutions Act of 1873 begins, that it is passed in order to amend and consolidate prior Acts, coupled with the indication of the consolidated portions by the references to the original Acts; and in the important fact that the section 16, which was divided into two in the Municipal Institutions Act, was included in its original form, as section 17, in the Drainage Act which was passed at the same time.

Let us now inquire what was the true effect of this section 17.

The second section authorized any Municipal Council to pass a by-law for drainage works on the petition of the majority in number of the owners resident on the property to be benefited in any part of any municipality.

Sections 3, 4, and 5, related to the passing of the by-law, and complaints against it.

Section 6 authorized the engineer of one municipality to continue the survey and levels into an adjoining municipality until he should find fall enough to carry the water beyond the limits of the municipality in which the deepening or drainage was commenced.

Sections 7 to 16 dealt with the case of a drain benefiting the lands or roads of a municipality through which no part of it ran; and with the case of a drain being continued from one municipality into another; making provisions for contribution to the expense by the second municipality and the mode of settling disputes between the municipalities.

Up to this point we have provision made for two classes of drains, viz.: those confined both in situs and in beneficial operation to one municipality, which for brevity sake I shall speak of as drains of the first class; and those continued into another municipality, or benefiting it without being continued into it. These I shall call drains of the second class.

Then turning to section 17 we read: "After such deepening or drainage is fully made and completed it shall be the duty of each municipality, in the proportion determined by the engineer or arbitrators (as the case may be) or until otherwise determined by the engineer or arbitrators, under the same formalities, as near as may be, as provided in the preceding sections, to preserve, maintain, and keep in repair the same within its own limits, either at the expense of the municipality or parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council upon the report of the engineer or surveyor may seem just; and any municipality neglecting or refusing so to do, upon reasonable notice in writing being given by any party interested therein, shall be compelled by *mandamus* to be issued from any Court of competent jurisdiction to make from time to time the necessary repairs to preserve and maintain the same; and shall be liable to pecuniary damage to any person who or whose property shall be injuriously affected by reason of such neglect or refusal;"

I pause here, though I have only reached a semicolon in punctuation of the section, to call attention to the language which is applicable to drainage works of both classes.



There is nothing to prevent the operation of the enactment upon the maintenance of a drain of the first class.

It will be noticed that drains of the second-class may lie wholly within one municipality, if they happen to benefit the lands in another. In that case, as well as in the case of drains of the first class, the enactment in terms casts the duty of maintenance upon the municipality where the drain is situated. Whether or not the other municipality, which under preceding sections had contributed to the expense of construction, is also bound to contribute to the expense of maintenance, may not be entirely clear, reading sections 8, 9, &c., in connection with section 17. That, however, does not concern us at present.

But inasmuch as drains of the first class are constructed wholly at the expense of the persons benefited, all of whom belong to one municipality, and in proportions settled by the by-law under which the work is done, and ought to be maintained by the same persons, the section goes on to qualify, with respect to those drains, the general provision which required some action of the council to settle a scheme of contribution; not withdrawing or varying the duty imposed by the first part of the section, but re-asserting it, and leaving untouched the declaration respecting mandamus and liability for damages, while it makes fresh action by the council unnecessary at the outset by applying to the repairs the same scheme already devised and set out in the original by-law, unless altered by the council.

The continuation of the section is in these words: "And in any case wherein after such deepening or drainage is fully made and completed, the same has not been continued into any other municipality than that in which the same was commenced, or wherein the lands or roads of any such other municipality are not benefited by such deepening or drainage, it shall be the duty of the municipality making such deepening and drainage to preserve, maintain and keep in repair the same at the expense of the lots, parts of lots and roads, as the case may be, as

agreed upon and shewn in the award or by-law as finally passed ; provided always, that the council may from time to time change such assessment on the report of an engineer or surveyor appointed by them to examine and report on such drain, deepening and repairs."

The words " as agreed upon and shewn," may, I think, be properly understood to mean " in the proportions agreed upon and shewn."

Finding thus in this statute, the force of which may have been obscured but has not been destroyed by converting section 17 into the two sections 542 and 543, express authority for the present action, it is not incumbent on us to notice the arguments founded on the present disjointed position of the enactments. But as the learned Chief Justice who tried the action, while he intimated an opinion coinciding with that which I have attempted to explain, did not decide upon that view of the statute so much as upon what he held to be the effect of section 543 treated as a substantive declaration of the duty to repair ; and as the decision has been questioned by one of the learned Judges in the Court below ; and as the argument before us was for the most part, if not altogether, addressed to the effect of these two sections 542 and 543, as enactments referring one to drains of the second class only, and the other to drains of the first class ; I ought not to pass by those arguments without some observation.

It is quite unnecessary to discuss the contention that the defendants are liable at common law for bringing water to the plaintiff's land, by means of the drain, which would not naturally have come there, and neglecting to provide means for carrying it away. Such an inquiry would be complicated by considerations arising from the plaintiff's own connection with the making of the drain, and would probably be found to be the question of the statutory duty in another shape.

Dealing with the effect of sec. 543, read as the only one which touches drains of the first class, some of the remarks I have already made are applicable. The proper reading

of the section would be, in my opinion, that an absolute duty to repair was imposed on the municipality, with a direction as to how the expense should be provided for. For neglect of that duty an action would lie at the suit of any one who was injured by that neglect. The principle of *Nitrophosphate, &c., Co. v. London and St. Katharine Docks Co.*, 9 Chy. D. 503, and of earlier cases of the same class, would apply. The distinction between cases of that class, where the damage complained of was directly occasioned by the neglect of the statutory duty, and such cases as *Atkinson v. Newcastle Water Works Co.*, 2 Ex. D. 441, where the accident was not caused by neglect of statutory duty, although the damages might have been less if the statutory duty had been performed, and where moreover the statute itself attached a penalty to the neglect of the duty, is obvious.

I do not think any implication could be drawn from the express bestowal of a right of action in sec. 542 and the silence of sec. 543 on that point, sufficiently strong to prevent the application of the principle of the decisions I have adverted to, or to compel us to admit the anomaly of a statutory duty created for the benefit of a class of persons, and no right of action for injury suffered from its neglect.

It was urged that a remedy might be found under section 545, which enacts that "if any dispute arises between individuals, or between individuals and a municipality or company, or between a company and municipality, or between municipalities, as to damages alleged to have been done to the property of any municipality, individual, or company, in the construction of drainage works or consequent thereon, then the municipality, company or individual complaining may refer the matter to arbitration as provided in this Act; and the award so made shall be binding on all parties."

It is not necessary to decide to what extent this clause, which is only permissive in its terms, might interfere with a right of action, because it relates only to disputes as to damages alleged to have been done by or in consequence

of drainage works, and the plaintiff here shews by his evidence, though he does not so allege in his statement of complaint, that even with the drain in its obstructed state he is better off than when there was no drain. His complaint is not of the kind mentioned in the clause.

In whichever way the sections are regarded the same result is reached, as far as the present action is concerned; but I prefer to put my decision on the view of the statute which I first discussed, because I am satisfied that that is the correct understanding of it.

In my opinion the appeal should be dismissed, with costs.

BURTON and MORRISON, JJ. A., concurred.

OSLER, J. A.—The proximate causes of the plaintiff's damage was, the defendants' breach of their statutory duty to keep the drain in repair, and that, I think, is sufficient to maintain this action. No further authority is needed on this point than *Brown v. The Great Western R. W. Co.*, 2 App. R. 70, and the case cited by Mr. Scott, of the *Nitro-Phosphate, &c., Co. v. The London, &c., Docks Co.*, 9 Ch. D. 503, 517.

I agree with the reasons given for the judgment in the Court below, though I think it may also be supported upon my Brother Patterson's view of the construction of the Act.

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## CORBET V. JOHNSON.

*Breach of contract—Measure of damages—Loss of profits—Speculative damages.*

The plaintiff agreed to complete and set up by a certain day a steam engine and machinery in defendant's mill in which he had previously been using water power, but failed to complete it for some time afterwards. The Master at Owen Sound, in estimating defendant's damages, allowed him, for loss of profits, in addition to rental of the mill and interest on the value of the machinery and of logs waiting to be sawed, \$118. On appeal from his report, PROUDFOOT, J., made an order declaring "that the true measure of damages the defendant is entitled to claim is the amount which would have been earned by the mill in the ordinary course of employment," and referred it back to the Master to review his report.

On appeal therefrom to this Court the judgment was reversed; the Court being of opinion that the Master had been sufficiently liberal in his allowance of damages to the defendant for breach of the contract; and that had any greater amount of damages been given it could have been allowed as speculative damages only.

The right to recover for loss of profits discussed.

APPEAL from the judgment of Proudfoot, J., whereby he overruled the finding of the Master at Owen Sound.

This action was instituted in the Chancery Division by John Corbet and Robert Corbet against Thomas Johnson, seeking to recover from him \$2,050, being the price agreed upon between the parties to be paid by the defendant to the plaintiffs for a steam engine and machinery supplied by the plaintiffs to the defendant for use in the steam saw mill of the defendant.

By his statement of defence the defendant brought into Court \$988 parcel of the amount so claimed, and alleged that that sum was enough to satisfy the claim of the plaintiffs, plus the damages sustained by the defendant and claimed by him as against the plaintiffs. The defendant admitted the agreement to pay the amount claimed for the said steam engine, but alleged that the plaintiffs agreed to manufacture such steam engine and machinery in a good and workmanlike manner, and to deliver and set up the same in the mill premises referred to in the plaintiffs' statement of claim, and to have the same in full running and working order on or before the 1st September, 1881, but wholly neglected to do so for a long time thereafter, whereby the

defendant had sustained damages by loss of business, of profits, and otherwise to the amount of the difference between the sum so brought into Court and the amount claimed by the plaintiffs; and the amount of such difference the defendant claimed to be allowed to set off against the claim of the plaintiffs.

The particulars of defendant's claim were as follows :

|  |           |
|--|-----------|
| Loss of profit for 118 days from 1st September, 1881, to 17th January, 1882, at \$8 per day .....                      | \$ 944 00 |
| Wages paid 5 men, hired by month, for half-time work occasioned by plaintiffs' default in putting in the machinery.... | 65 50     |
| Extra expense in building in boiler, occasioned by such default..  | 30 00     |
| Hauling machinery to mill .....  | 25 00     |
|  | <hr/>     |
|  | \$1064 50 |

The action came on for trial at Owen Sound on the 26th of September, 1882, before Proudfoot, J., who then gave judgment for, amongst other things, a reference to the Master at Owen Sound "to take an account of the damages sustained by the defendant in consequence of such non-completion of said agreement by the time so agreed upon, and that the amount so found by the said Master (if any) be deducted from the said sum of \$2,050, and that the plaintiffs do have judgment for the balance (if any) after deducting the sum of \$988 paid into Court by the defendant."

In pursuance of this judgment the Master at Owen Sound heard the evidence adduced, and by his report dated 7th March, 1883, found as follows :

"That the damages sustained by the defendant in consequence of the non-completion of the agreement in said judgment mentioned or referred to, amount to the sum of \$434.23."

The Master stating :

"I do not think it necessary to shew exactly in detail how I make up that damage, but that it may be known in case of appeal, I may mention that I considered the rental of the mill, the value of the machinery ordered, the value of the logs waiting to be sawn. These items alone being taken into consideration, I find they represent a damage to the defendant of \$226.23. As by only taking the above the defendant would be getting nothing for profit in running the mill, I think it reasonable to

allow as a loss of profit that should have been within the contemplation of both parties, \$1 per day, or \$118. I find as a fact (and think that the judgment binds me on that point) the plaintiffs were to haul the machinery, 'complete and set up.' The plaintiffs put the cost of hauling at \$15, but owing to the fact that full loads were not always ready, I do not think the defendant's charge too much, viz : \$25. The extra time occupied building the boiler in, and extra men and time with that and other work I put together at \$65, which makes the extra damage of defendant amount to \$434.23. I think the evidence conclusive that considering all the special circumstances the defendant actually suffered a far greater loss, but I attribute the rest to special circumstances undisclosed to the plaintiffs, and which cannot fairly be considered as being reasonably within the contemplation of the plaintiffs.

In fixing the loss of profit at \$1 per day over and above what I gather from the evidence would be a fair rental and fair allowance by way of interest on the logs on hand, I have allowed what has been called speculative damages, but I think it reasonable to suppose that any person renting a mill and laying out a large sum in improving same, would fairly be considered as contemplating profit over a fair rental, and I have fixed on \$1 a day as a sum reasonably within the contemplation of both parties to the contract."

From this report the defendant appealed, on the ground, amongst others, that

"The said Master was wrong in not allowing the defendant a greater amount of damages than the sum of \$434.23, allowed by the said report, a much larger amount having been proved by the defendant as sustained by him (as admitted by the judgment given herein by the said Master) but disallowed on the ground that the damages as proved were speculative, and not recoverable in accordance with the decisions and rulings in such cases."

The plaintiffs also appealed from the report upon the following amongst other grounds :—

"(1) That the amount awarded as damages to the defendants by the Master's said report for non-completion by the plaintiffs of their contract with the defendant is excessive, and is not sustained or warranted by the evidence; (2) and especially as to the sum of \$118.00, awarded as damages by the said report against the plaintiffs, that the same are purely speculative as stated in the Master's judgment, and that there is no evidence to support the same."

The appeal and cross-appeal came on to be argued before Proudfoot, J., on the 29th of March, 1883, when the appeal of the defendant was allowed with costs, the Court declaring—

“That the true measure of the damages the defendant was entitled to claim, was the amount that would have been earned by the mill in the ordinary course of employment.”

And it was referred back to the said Master to review his report, having regard to the declaration in the first paragraph of the said order.

The Court made no order on the cross-appeal of the plaintiffs, reserving judgment thereon until after the Master's report under the order then drawn up.

From this decision of Proudfoot, J., the plaintiffs appealed, and the appeal came on to be heard before the Court on the 10th of June, 1884.\*

*Bethune, Q. C., and W. Creasor*, for the appellants, contended that the declaration in the judgment of the learned Judge below was erroneous, and as applied to this action wrong in law; and that the appeal of the defendant from the Master's report should not have been allowed, but dismissed, on the ground that the said Master was right in not allowing the defendant a greater amount of damages than the sum of \$434, as any amount over that would have been in the nature of speculative damages and too remote, and could not be sustained or warranted by the law and evidence, citing *Hadley v. Baxendale*, 9 Ex. 341; *British Columbia Mill Co. v. Nettleship*, L. R. 3 C. P. 499; *Thol v. Henderson*, L. R. 8 Q. B. 457; *Portman v. Middleton*, 4 C. B. N. S. 322; *Gee v Lancashire & Y. R. W. Co.*, 6 H. & N. 211; *Horn v. Midland R. W. Co.*, 42 L. J. C. P. 59; *Waters v. Towers*, 8 Ex. 401; *O'Hanlan v. Great Western R. W. Co.*, 34 L. J. Q. B. 154; *Gibbs v. Gildersleeve*, 26 Q. B. 473; *Griffin v. Colver*, 16 N. Y. 489; *Mayne on Damages*, 3rd ed., pp. 8, 9, 10, 20, 39.

*Lane*, for the respondent, submitted that the declaration or rule laid down by the Court below for the guidance of the Master in estimating the measure of damages to be allowed the defendant was correct. Had the Master been guided by the principles laid down in the declaration

\**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.,



appealed from, he must have allowed the defendant greater damages than he did allow ; and the damages asked for by the defendant were not speculative in the legal sense, but naturally arose from the breach of contract, and were capable of being ascertained from the evidence given before the Master, and should have been allowed : *Simpson v. The London and North-Western R.W. Co.*, L. R. 1 Q. B. 274 ; *Rowley v. London and North-Western R.W. Co.*, L.R. 8 Ex. 221 ; *Fletcher et al. v. Tayleur*, 27, C. P. 21 ; *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181 ; *Balantyne v. Watson*, 30 C. P. 529.

September 8, 1884. HAGARTY, C. J. O.—It is to be regretted that, on overruling the Master's decision, the Court below did not enter into any discussion of its views on this most important question of the measure of damages.

I know of no English decision by which it was established that for the non-completion or non-delivery by the stipulated time, of something necessary to start a new business, the profits expected to be made in such business could, as such, be recovered.

It seems to me that the current of decision and opinion on both sides of the Atlantic, has run strongly the other way.

It may be well to notice the English cases usually referred to in support of the Respondent's contention.

In *Fletcher v. Tayleur*, 17 C. B. 21, the jury, in an action for non-completion of a ship by the time specified, gave damages for the difference between the net freight which she probably would have earned had she been delivered at the proper time, and the amount actually earned by her when delivered some months later when freights were lower. The Court refused to disturb the verdict, no question having been raised at the trial as to the principle on which the damages ought to have been assessed.

In the discussion on the rule, the Judges give no clear expression of opinion. As to this case see *Mayne* on

Damages 3rd ed. 34; *Benjamin* on Sales (Ed. 1883) 878. The cases cited in the notes to the American edition, are strongly against the claim. *Boyle v. Reeder*, 1 Iredell 607; *Freeman v. Clute*, 3 Barb. 424; *Taylor v. Maguire*, 12 Mo. 313; *Porter v. Wood*, 3 Hump. 56.

The note of the case in 1 Iredell, seems expressly in point in the case for judgment.

*Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181, was an action for delay in delivering a floating derrick, commonly used for storing coal. For such purpose it would have been worth to plaintiff, during the six months between the contracted time and the actual time of delivery, £420. This amount was held to be recoverable, being damages which the defendants must be taken to have contemplated would result from the non-performance of their contract.

The circumstances were very special. The remarks of Blackburn, J., may be specially referred to.

No general principle which would govern a case like the present is laid down.

*In re Trent and Humber Co.*, L. R. 6 Eq. 396, proof was allowed in Bankruptcy, for damages for not delivering a steamboat at the specified time. Giffard, V.C., allowed proof for the net profit which the owners would have made by chartering the vessel if she had been delivered at the specified time. Proof had been given of charter parties that might have been effected, and were actually in negotiation, but had to be broken off owing to the non-delivery of the vessel, and also of a depreciation in the marketable value of ships between that time and the time of actual delivery.

The Vice Chancellor considered *Cory v. Thames Iron Works Co.* in point. This case was appealed on many grounds.

In L. R. 4 Ch. 115. the Vice Chancellor's decision was upheld by Cairns L. C., without any notice of the authorities. He says, as to the measure of damages, he proceeded upon the principle that if a profit would arise from a chattel, and it is left with a tradesman for repair, and detained by him beyond the stipulated time, the

measure of damage is *primâ facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time.

On this case see *Benjamin* on Sales, p. 879.

In *Simpson v. London and North Western R. W. Co.*, 1 Q. B. D. 274, it appeared that plaintiff was in the habit of attending at agricultural shows to exhibit his goods, and made profit by the practice. He delivered them to the defendants at a show ground, to be carried to another show ground, where a similar show was to be held. The goods did not arrive till the show was over. Defendants paid £10 into Court to cover pecuniary expenses of the plaintiff. He lost several days in looking for his goods. It was proved he had obtained customers by his exhibitions. A verdict of £20 was taken by consent, to be entered for defendants if the Court was of opinion that plaintiff was not entitled to recover for either loss of profit or loss of time, with power to draw inferences.

Cockburn, C. J., says: "As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility. To some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all."

Mellor, J., said: "The ascertaining the amount of profits supposed to have been lost was not a matter upon which we have to trouble ourselves."

In *British Columbia Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499 (heard in the same year as *Cory v. Thames Iron Works Co.*), machinery was shipped to British Columbia to be used in a saw mill, there to be erected. An important portion of the machinery was never delivered, and in consequence the mill could not be used and was wholly delayed eleven or twelve months, till the missing part could be replaced. Held that the measure of damages was the cost of replacing the lost articles with interest at five per cent.

That very learned Judge Sir James Willes, in a vigorous judgment, repudiated the argument that plaintiffs could recover the profits they might have made during that

period from the use of the mill. The carrier knew this was machinery intended to be used in a mill to be erected in British Columbia. Bovill, C. J., gives judgment to the same effect; Byles, J., concurring. See *Mayne*, 25, on this case, and *Benjamin*, 880-1.

In *Horn v. Midland R. W.*, L. R. 7 C. P. 591, Willes, J. repeats and adheres to his judgment in *British Columbia Saw Mill Co. v. Nettleship*. He notices that it must be remembered that this is the case of a common carrier who is bound to accept the goods. He repeats "Knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special conditions attached to it."

On appeal the decision was affirmed, L. R. 8 C. P. 13. In the judgments delivered there seems to be a marked agreement with this dictum of Willes, J., as to the effect of notice

Kelly, C. B., points out that it did not seem to have occurred to the Court below or the counsel that there was any material difference between the case of a railway company and that of any ordinary person who had contracted for the delivery of goods. The Court of Error does not discuss any such difference, but proceeds to adjudicate on the liabilities of a common carrier.

The judgment of Blackburn, J., in *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, may be referred to. Speaking of *Cory v. Thames Iron Works Co.*, at p. 477, he says: "At all events the plaintiffs were entitled to recover at a rate per day equal to whatever the jury should find to be a reasonable compensation for the loss of the use of the waggons."

This case, however, does not deal with the question of profits expected from a business to be commenced.

The learned judge calls attention to the doubts expressed at p. 10, 2nd ed. of *Mayne's* work, whether mere knowledge of what the purchaser intended to do with the articles to be delivered would bind the other party unless it was shewn that he was told he would be held answerable



and consented to undertake such a liability. He says that much that fell from the Judges in *Horn v. Midland R. W. Co.*, tended to confirm these doubts.

*Thol v. Henderson*, 8 Q. B. D. 457; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, were as to damages where a sub-contract was made by plaintiff on the faith of receiving the goods. The latter case would be applicable here if the respondent had made a special contract with a third party depending on the appellant performing his contract.

It must not be overlooked that there is a difference between the position of the carrier who cannot refuse the goods properly offered to him, and the vendor who voluntarily enters into an engagement to deliver by a named time.

The rule in the American Courts is discussed in *Benjamin on Sales* (1883), p. 892. The *Hadley v. Baxendale*, (9 Ex. 34), rules are very fully discussed in 1 Sedgwick, 218. (Ed 1880.) The English cases are noticed at p. 226.

The leading American case is said to be *Griffin v. Colver*, 16 N. Y. 489. Damage was claimed for delay in delivering an engine which the defendant knew was to be employed to drive machinery for sawing and planing lumber. As to profits, Selden, J., delivering the judgment of the Court, says: "It is a well established rule of the common law that the damages to be recovered for a breach of contract must be shewn with certainty, and not left to speculation or conjecture, and it is under this rule that profits are excluded from the estimate of damage in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for defendants' default, are recoverable, those which are speculative and contingent are not. \* \* The parties are not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery had the contract been complied with. Nearly every element entering into such a computation, would

have been of that uncertain character which has uniformly prevented a recovery for speculative profits." He refers to *Blanchard v. Ely*, 21 Wend. 342, where, in consequence of defects in machinery of a steamboat, to be delivered ready by defendants, she was much delayed. Selden, J., speaking of the case says that the plaintiff could have recovered what he could have realized by chartering the boat for trips lost by the delay.

At p. 230 in *Sedgwick, Cassidy v. Lefevre*, 45 N. Y. 562, is referred to, where machinery was to be delivered in perfect working order, and it was held that damages could not be given for the difference between what could have been earned with this machinery and what was actually earned without it during the time it was being repaired.

*Sutherland on Damages*, Vol. I, 109, 110, lays down the rule to the same effect, and explains how the injured party could recover losses in outlay incurred in contemplation of the contract being performed, actual loss of wages of men kept idle, rental value of premises, &c., &c.

On the whole it appears to me that the amount allowed by the Master was as much as should fairly or legally be found, and I am unable to agree with the judgment of the Court below, viz: that "the true measure of damage is the amount that could have been earned by the mill in the ordinary course of employment."

Speaking for myself, I have a strong feeling that we should not in any way extend the principle on which damages are awarded in breaches of contract, where no bad faith appears. I dread very much the awarding of any thing like speculative damages. In the absence of express agreement I do not think it would ever enter into the contemplation of a man contracting in good faith to furnish machinery for a mill to be erected, that if he accidentally failed to furnish it by a given day he was to be made liable for all the profits which the sanguine mind of his opponent or his witnesses might declare to have been lost by the delay.

I can understand an allowance for loss of profits for the loss of the use of an article not delivered, as in *Cory v.*

*Thames Iron Co.*, or in *Re Trent Humber Co.*, where it was proved that charters were being negotiated for and lost by the defendant's default, and as suggested by Selden, J., in the case cited of *Griffin v. Colver*. But I cannot agree that the general profits here awarded are properly allowed.

I think the appeal must be allowed, with costs.

BURTON, J. A.—The appeal in this case is from an order of Mr. Justice Proudfoot, declaring that the true measure of damages which the defendant is entitled to claim by reason of the plaintiff's failure to complete the manufacture of a steam engine for a mill and have the same in full running and working order by a stipulated time, was the amount that would have been earned by the mill in the ordinary course of employment; and with that declaration there was a reference back to the Master to review his report.

It had been found by the decree made at the hearing that the machinery was agreed to have been completed and set up by the plaintiff for the defendant, on the mill premises of the defendant, by the 1st day of September, 1881, and was not so completed until the 12th day of January following. Hence the reference to the Master to ascertain the damages sustained.

The contract price for the machinery was \$2,050.

The Master allowed as damages for non-completion the sum of \$434.23, which included \$1 per day as profit in running the mill during the interval, 118 days, or \$118. The defendant claimed in respect of such item \$8 per day.

The only additional material fact beyond that of the occurrence of the delay was that the plaintiff was informed when the bargain for the engine was made that the defendant had logs in the pond ready to cut, and that the reason that he required the engine so soon was that he wanted to get them cut before the fall rain set in.

In point of fact the logs were subsequently cut and sent to market, so that the only claim in that respect would appear to be properly confined to the loss of interest.

There does not seem to be much ground for quarrelling with the direction of the learned Judge in the abstract, but the question is, rather whether in the circumstances of the case any ground existed for sending the matter back to the Master.

I referred in the case of *Hendrie v. Neelon*, 3 O. R. 603, to what I understood to be the well known rule, that damages to be recovered for breach of contract must be shewn with reasonable certainty, and that profits are not necessarily excluded in the computation. If it could be shewn that they would certainly be realized but for the contracting party's default, they are, as I understand the rule, recoverable, but not if they are speculative or contingent.

The general rule appears to be very concisely formulated in one of the American cases, thus: that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, but subject to two conditions:—

1st. The damage must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow upon a breach of it, and 2nd. They must be certain both in their nature and in respect to the cause from which they proceed.

The damages may be the ordinary and natural and even necessary result of the breach, and yet if in their nature uncertain they must be rejected.

In the case of *Freeman v. Clute*, 3 Barb. 424, the contract was to construct a steam engine to be used in the process of manufacturing oil, and it was contended there, as here, that the damages were to be estimated by ascertaining the amount of business which could have been done by the use of the engine, and the profits which would have thence accrued. That was rejected, but the Court held nevertheless that compensation was to be allowed for the loss of the use of the plaintiffs' mill and machinery. And in a case of *Griffin v. Colver*, 16 N. Y. 489; in the New York



Court of Appeals, the fair rent or value of the mill was held to be the proper measure of damages.

I do not know that the remarks of Lord Cairns, in *Re Trent Co.*, L. R. 4 Ch. 117, are necessarily opposed to this view. He says he had proceeded on the principle that if a profit would arise from a chattel and it is left with a tradesman for repair, and detained by him beyond the stipulated time, the measure of damages is *primâ facie* the sum which would have been earned in the ordinary course of employment of the chattel at the time.

That was quite consistent with the damages being based upon what could have been realized by the chartering of the vessel, which was the chattel referred to, but I very much doubt, if it had been suggested that in order to arrive at the amount an estimate should be made of the uncertain and contingent profits which might have been made by running the vessel, depending upon the fluctuations of travel and trade, that he would have sanctioned that method of estimating the damages.

The value of a charter is a matter which could be rendered reasonably certain by evidence; the profit to be made by actual running of the vessel would have been purely speculative.

In the present case the defendant was entering himself upon an experiment in erecting a steam mill in place of the water mill which he had previously in use, precisely such a case as is referred to by Mr. Justice Willes in his judgment in the *Nettleship Case*, where he alludes to the party setting up for the first time a trade, the probable profits of which are wholly incapable of calculation or approximation, and adds that in such a case it would be making a guess in order to impose upon the carrier (in that case the action was against a carrier), for the mere breach of a contract an extent of liability which we should decline to fix even upon a wrong doer.

The Master has given an amount for loss of profit during the 118 days the mill was idle, in addition to his estimate of a fair rental and interest, and I should fear that a refer-

ence back to him under such circumstances with such a direction, as to which I have said no objection can be made in the abstract, might be regarded as an intimation that he was bound to base his estimate upon some such vague and indefinite evidence as I have referred to.

The Master seems to have been perfectly alive to the propriety of compensating the defendant for the loss of profit which he would have made but for the delay, and to have given a liberal amount on that head, and I do not think that finding ought to be interfered with.

PATTERSON, J. A.—The recognized rule as to the measure of damages for breach of contract, I understand to be that laid down in *Hadley v. Baxendale*, 9 Ex. 341. But that rule, like most other general rules, is apt to be now and then rather hard to apply to the particular state of facts with which a Court has to deal. Most of the numerous cases in the Courts, English, American, or Canadian, to whose decisions we look for assistance, in which, during the last five and twenty years, the measure of damages has been discussed, will be found to have scarcely, if at all, modified that rule, but to be merely instances of the adaptation of the rule to the particular case in hand.

The principle stated in the language of Alderson, B., who delivered the judgment of the Court, I shall read as quoted by Blackburn, J., in *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. at p. 188: "The Court say," Lord Blackburn remarks, "We think the proper rule in such a case as the present, is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself,—that," Lord Blackburn, notes, "is one alternative,—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

In *Benjamin* on Sales, 3rd ed., p. 891, it is said: "The rules in America for the assessment of damages do not materially differ from those adopted in England \* \* \* With regard to special damages it has been laid down in the leading case of *Griffin v. Colver*, 16 N. Y. 489, that the broad general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained; and this rule is subject to but two conditions:—1. *The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and, 2. They must be certain, both in their nature and in respect to the cause from which they proceed.*

"The familiar rules on the subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract is a mere mode of expressing the first; and that they must be, not the remote, but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

Then the learned author proceeds to remark that "in America, therefore, the second branch of the rule laid down in *Hadley v. Baxendale*, viz.: that the damages must be such as may fairly be supposed to have been in the contemplation of the parties at the time when they made the contract, has been generally accepted and adopted as a charge to juries; and the first branch of the rule, viz.: that the damages must be such as flow directly and naturally, *i. e.*, in the ordinary course of things, from the breach of the contract, has been treated as only another way of expressing the same rule."

In *Wilson v. The Newport Dock Co.*, L. R., 1 Ex. 177, Martin, B., who had been party to the judgment in *Hadley v. Baxendale*, made some observations respecting the language of Alderson, B., which I have quoted. He said (p. 184) "I do not adopt the qualifications mentioned by Mr. Baron Alderson in the judgment in *Hadley v. Baxen-*

*dale* as applicable to every case. They may have been perfectly right there, but they are not of universal application. 'Naturally,' he says, 'means, according to the usual course of things;' but contracts are infinite in variety and suppose, as in this case, no such claim for damage has ever been known to have been made, no usual course of things exists; but the damages to be recovered by the plaintiff are not, in my opinion, therefore to be nominal. And he proceeds to say: 'such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it.' Now this may properly enough be taken into consideration in the case of carriers and their customers, but in the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed and not broken, and in the infinite majority of instances the damages to arise from the breach never enter into their contemplation at all." This criticism of the second branch of the rule in *Hadley v. Baxendale* is spoken of in *Sedgwick* on Damages, 7th ed., p. 233, as seeming to be very just. The learned writers give their opinion that that form of the rule is sometimes misleading, and yet say it frequently furnishes valuable assistance; but they indicate their preference for the first branch, saying: "It is possible to say with some definiteness what would follow in the usual course of things; but what the intention of the parties *probably* was, is a very difficult matter to arrive at."

In the case before us we have not the advantage of knowing from any note of what may have been said by the learned Judge, the views he may have taken of the rule as applicable to the peculiar facts of this case. We have merely the formal order as drawn up and issued, which contains this declaration: "This Court doth declare that the true measure of damages the defendant is entitled to claim is the amount that would have been earned by the mill in the ordinary course of employment."

Reading this literally, as we must read it, it does not strike me as stating the rule of law inaccurately.



The consequence of the breach of the contract to have the mill completed at the fixed time was that during the delay no profits could be earned by it. The loss of such profits would, in my judgment, be the damages naturally arising from the breach; or, taking the other alternative laid down in *Hadley v. Baxendale*, they are just such damages as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, if they thought of the matter at all. They necessarily knew that the mill was intended to be employed, and employed with the view to make profits.

But while I think the judgment thus correctly states the rule, it does not follow, as of course, that the order referring the case back to the Master to review his report, having regard to the declaration of the law, should be sustained; because we may be satisfied that the Master has already substantially acted upon the principle now laid down for his guidance.

The question is, to my mind, one of evidence rather than of any disputed rule of law.

If it can be shewn that the mill *would have earned* a certain amount during the delay, and that those earnings have been lost by reason of the delay, I do not know why that amount ought not to be assessed as damages. But then, the amount that *would have been earned* may be something very different from the mill owner's sanguine estimate of his prospective profits; and even a well founded and moderate estimate may be based on other data than the possession of the tools which, handled by a workman of skill and enterprise and judgment, with favoring circumstances, might produce large gains; but which, in other hands, or with inferior luck, might yield no profit at all.

How much *would have been earned*, which is the language of the judgment, and earned in the ordinary use of the mill, must be a question of fact to be decided by the proper tribunal. Until earnings are actually realized, their amount is necessarily to some extent a matter of speculation; but that, as remarked by Cockburn, C. J., in *Simpson*

v. *London and North-Western R.W. Co.*, L. R. 1 Q. B. 274, is no reason for not awarding any damages at all.

In the American statement of the rule on the subject, which I have quoted from *Benjamin* on Sales, gains prevented are included in the damages properly assessable and instances are not wanting amongst either the English or the American decisions in which damages of that character were assessed. One instance is found in the case I have already cited of *Cory v. Thames Iron Works Co.* But in assessing such damages the second condition stated by Mr. Benjamin from the American case, viz.: that they must be certain, both in their nature and in respect to the cause from which they proceed, ought to be observed.

Now we have before us the Master's very careful report with his statement of the grounds on which he proceeded. He recognizes loss of profits as one ground for awarding damages, and for that he allows a dollar a day over what he considers a fair rental. That, to use the words of the order now in appeal, he fixes as what *would have been earned* by the mill in *the ordinary course* of employment, excluding those more speculative grounds which depended on special circumstances or mere expectation of extraordinary success.

The amounts allowed, are for his estimate of the rental of the mill, and interest on the value of the machinery ordered, and of logs waiting to be sawed, \$226.23; loss of profit, over and above that amount, \$118; and \$90 for some expense; making in all \$434.23.

I do not think we have any reason to hold that he has not been sufficiently liberal in his estimate of the defendant's loss; or that he ought upon the evidence to have held that any larger amount would have been earned by the mill in the ordinary course of employment.

Therefore, while I do not quarrel with the rule laid down by the Court below, I agree that we should allow the appeal and leave the Master's report undisturbed.

MORRISON, J. A., concurred.

## MACDONALD V. BULLIVANT.

*Mortgager—Merger.*

The defendant having mortgaged certain lands, conveyed them to one P., and afterwards, becoming insolvent, he included this in his schedule as an indirect liability. The conveyance was silent as to whether it was a sale of the equity of redemption merely, or of the whole estate, the payment of the mortgage being part of the consideration, but from the evidence the Court inferred the latter. The mortgagee who had been no party to the arrangement, afterwards obtained from P. the equity of redemption which he caused to be assigned to his wife, in order as he said to prevent a merger; and he then sued the defendant on the covenant for the mortgage money.

*Held*, that there was no merger, and that the plaintiff was entitled to recover.

THIS was an appeal from a judgment of Galt, J., dated 16th March, 1883, whereby an appeal from an award or report made by Senkler, Judge of the County Court of Lincoln, was dismissed.

The facts appearing in the case were that by indenture of mortgage dated 23rd December, 1875, the defendant covenanted with the plaintiff to pay him \$500 on the 22nd December, 1877, with interest at ten per cent. payable half-yearly, on the 23rd days of June and December in each year, until paid; and that the said principal sum had not been paid, nor any part thereof. but the interest was paid up to the 23rd June, 1877, and no more.

The plaintiff claimed for principal, interest, and other charges, \$844.34, together with subsequent interest until judgment.

By his statement of defence the defendant set up that by indenture dated 2nd February, 1877, the defendant conveyed the land mentioned in the mortgage, together with other lands, to one Annie Potter, subject to the payment of such mortgage, which the said Annie Potter assumed and agreed to pay and discharge: that about the 6th of April, 1878, there being an amount of interest in arrear and unpaid upon the said mortgage, the said Annie Potter offered to convey to the plaintiff her equity of redemption in the said lands in full payment and satisfaction of such mortgage, and the plaintiff then accepted such

offer and undertook to prepare the conveyance to himself of such equity of redemption : that a few days after such agreement was made, the plaintiff desired the said Annie Potter and her husband to execute a deed of the said lands to Eliza C. Macdonald, the wife of the plaintiff, instead of to himself ; and that the said Annie Potter and her said husband, to carry out the views and wishes of the plaintiff, and without having seen or had any communication with his wife, did on the 6th of April, 1878, convey all their interest in the said land to the said Eliza C. Macdonald in full satisfaction and discharge of the money mentioned in and secured by such mortgage, and the plaintiff then received such conveyance of the said land in full satisfaction thereof ; that thereupon the plaintiff took possession of said lands, and had been in the receipt of the rents and profits thereof as owner ever since, and never made any claim upon the defendant for the interest or principal of such mortgage until within a few weeks before the commencement of this action.

The defendant further set up (in the 7th paragraph) that after the making of the said mortgage the defendant became insolvent, and before the commencement of this suit, in pursuance of the insolvent acts, an attachment in insolvency issued against him, and he afterwards made an assignment for the benefit of his creditors according to the provisions of the said acts; and the defendant not having procured the assent of his creditors to his discharge under such acts, he did, after one year from the issue of the attachment in insolvency, apply to the proper Judge for his discharge, after due notice being given of such application as prescribed by the said acts, and the said Judge granted the defendant an absolute discharge on the 23rd November, 1878, whereby the defendant was discharged from the claim of the plaintiff.

In reply, the plaintiff, while admitting that Mrs. Potter had conveyed the equity of redemption to the plaintiff's wife, at his request, alleged that he caused such conveyance to be made to his wife as trustee for himself,



and in order to prevent a merger of the mortgage and equity of redemption, and to preserve his rights under said mortgage against the defendant personally. And as to the seventh paragraph of the statement of defence the plaintiff alleged that if the facts therein alleged were true, which he denied, the liability of the defendant to the plaintiff—the subject of the action—was not mentioned or set forth in the statement of the defendant's affairs, exhibited at the first meeting of his creditors, nor was such liability shewn by any supplementary list of creditors furnished by the defendant previous to his alleged discharge, nor did such liability appear by any claim subsequently furnished to the assignee in insolvency of the defendant's estate, nor was the plaintiff's claim ever furnished to the assignee, or proved against the estate of the defendant, nor was such discharge ever confirmed ; and that the plaintiff had always been willing, and thereby submitted to be redeemed and to reconvey said lands to the defendant freed and discharged from said mortgage, and to give up possession of said lands to the defendant upon being paid the amount due to him under his security.

The case came on for trial at St. Catharines, before Patterson, J. A., in October, 1882, when a reference was directed to the Judge of the County Court, who, after taking evidence, found in favour of the claim of the plaintiff to the amount of \$678.85. The learned Judge in giving his reasons for the result at which he had arrived stating, amongst other grounds :

“The question must be decided on the deed itself. Had the deed been given to the plaintiff himself I should have unhesitatingly held that the debt was merged, it not being shewn that there was any agreement or understanding that it was to be kept alive. The case of the *North of Scotland Mortgage Co. v. Udell*, 46 U. C. R. 511, is a clear authority that in such a case the onus of proving that there is no merger is upon the plaintiff.

“The deed in this case, however, is to another person, who is admitted not to have any interest in the matter except as trustee for the plaintiff.

“There would probably be no merger at law under such circumstances, but the question has now to be considered according to the rule of equity.

“I have not been able to find any case precisely in point. In most of the cases, the question was between the purchaser of the equity and some

other incumbrancer who would be let in if a merger took place. In such cases the question what was the intent of the purchaser was considered, and often prevented a merger : See *Street v. Commercial Bank*, 1 Gr. 169. In *Hart v. McQuesten*, 22 Gr. 133, (in appeal), the question is discussed at length by Draper, C. J., who cited with approval the case of *Forbes v. Moffat*, 18 Ves. 384, as shewing that merger will depend on the actual or presumed intention of the person in whom the interests are united. He also says : "I take it to be clear that in England the merger of a security might always be prevented by an expressed or implied intention to the contrary.

"What intention (if any) was indicated by the plaintiff taking the deed to his wife and not to himself ? The reasonable inference to draw from this, in my opinion, is, that he did not wish the mortgage debt to merge.

"It is true there was no intermediate incumbrance, and the prospect of the defendant being able to pay was not good ; still, if there was any motive it must have been the wish to keep the debt alive.

"I am aware that in *Fisher on Mortgages*, 1st ed., at p. 451, it is laid down that the taking a conveyance, to a trustee without a declaration that the object was to preserve priority will not always be sufficient to preserve priority, this being only one of the grounds upon which in equity the presumption of merger may be rebutted, and not decisive evidence against the merger.

"The system of conveyancing in England, however, differs materially from that in this country. Conveyances to trustees are not nearly so common here as there. The circumstances of the present case do not resemble those of the cases cited in support of the proposition in *Fisher*.

"I therefore am of opinion that no merger took place, and I base my opinion upon the fact that the deed was taken not to the plaintiff himself, but to his wife, who was, in fact, although not so expressed, a trustee for him, considering that his so taking it indicated an intention on his part that no merger should take place." \* \* \*

The defendant thereupon moved before Galt, J., to set aside the finding of the County Judge which, after hearing counsel for the parties, was refused, with costs.

The defendant then appealed to this Court and the appeal came on to be heard, on the 10th of June, 1884.\*

*A. Hoskin*, Q.C., for the appellant. Under the circumstances shewn by the evidence here the appellant was certainly entitled to the benefit of any doubt the learned County Judge may have entertained, and further the respondent was, by his own dealings, estopped from making any claim against the appellant upon the mort-

\**Present*—HAGARTY, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

gage ; and if there was any doubt upon the oral testimony the benefit should have been given to the appellant, because the documentary evidence makes a strong *prima facie* case in his favor. Here Macdonald can occupy no higher or better position than his wife, who he alleges was his trustee, and if she could not recover then he is not in a position to do so either ; and it must be conceded that Mrs. Macdonald is placed in this position—either she must pay off the respondent's mortgage or she must pay the consideration mentioned in the deed to herself. The evidence shews that the amount of the consideration was arrived at and inserted in the deed by the respondent, and that the consideration was not paid. The respondent ought not, in the same breath, to be allowed to say : "I have not paid the consideration mentioned in the deed I got of the land, but still I will claim the amount due on my mortgage ; which is the same as the amount of the consideration."

The evidence shews that as between the appellant and Mrs. Potter the latter was liable to pay, and she assumed the payment of the respondent's mortgage, and was bound to indemnify the appellant. The evidence also shews that the respondent agreed to relieve Mrs. Potter from further liability upon the mortgage. This debarred the respondent from making any further claim upon the appellant. The simple fact that the consideration in the deed was the amount then due on the mortgage, is convincing proof that the deed was taken in satisfaction of the mortgage debt, otherwise the consideration would have been a much smaller or a merely nominal one.

An additional fact in support of the appellant's contention is, that the respondent immediately after the execution of the deed to Mrs. Macdonald went into and retained possession of the property.

*Irving v. Boyd*, 15 Gr. 157 ; *Nicholls v. Watson*, 23 Gr. 606 ; *Parker v. Glover*, 24 Gr. 537 ; *Clarkson v. Scott*, 25 Gr. 373 ; *Clark v. Bogart*, 27 Gr. 450 ; *Campbell v. Robinson*, 27 Gr. 634 ; *Norris v. Meadows*, 28 Gr. 334 ; In appeal 7 A. R. 237 ; *Canavan v. Meek*, 2 O. R. 636.

*Cassels*, Q.C., for the respondent. The doctrine applicable to merger of securities has no application whatever to this case. The case made by the appellant apparently is that he having conveyed to Mrs. Potter subject to the mortgage, might compel Mrs. Potter to indemnify him if called upon to pay the amount due, and that Mrs. Potter having conveyed to Mrs. Macdonald in the same way, she, Mrs. Potter, could compel Mrs. Macdonald to indemnify her; and because, as it is alleged, the plaintiff is the *cestui que* trust of Mrs. Macdonald, therefore, to avoid circuitry of action, a merger has taken place. The contention of the appellant is unsound. The right, if any, is founded on contract, and even if the facts stated were correct there is no privity of contract between the present appellant and Mrs. Macdonald. The only title to relief would be the satisfaction of the mortgage, and the evidence is conclusive in favour of the respondent on this point. The evidence shews that Potter was not acting as agent for, or on behalf of the appellant in the negotiations for the assignment. He knew that Mrs. Potter was not liable for the mortgage debt, and he did not suppose that she was liable to indemnify the appellant if the latter were compelled to pay it. As between the appellant and Mrs. Potter, his ultimately making good to her what she lost in the transaction, shews that it was never the intention of the parties that Mrs. Potter should become liable for payment of the mortgage debt in relief of the appellant.

The two estates never were united in the same person, and the doctrine of merger is not applicable, nor is it analogous to the case of an assignment of a satisfied incumbrance to keep it alive as against subsequent incumbrances.

The doctrine of estoppel has no application here. The consideration named in the assignment was not paid, and it is open to both parties to shew what the true consideration was. The *onus* was on the appellant to prove the contract which he alleged and the respondent denied this he has failed to do.



The respondent has always been ready and willing to restore and reconvey the mortgaged premises to the appellant on payment of the debt. His taking possession and procuring an assignment of the equity of redemption to a trustee for him, certainly puts him in no worse position than that of a mortgagee, who has foreclosed and taken possession, and who in that case may still sue on the covenant. He cited in addition to the cases above mentioned; *Pierce v. Canavan*, 28 Gr., 356, 7 A. R. 187; *Clarkson v. Scott*, 25 Gr. 373; *Mills v. Choate*, 2Ch. Ch. R. 374; *Coote on Mortgages*, 4th Ed., page 1027.

June 16, 1884. The judgment of the Court was delivered by

BURTON, J. A.—We are not embarrassed, I think, in this case by the questions which engaged the attention of the Courts in *North of Scotland v. Udell*, 46 U. C. R. 511, and in the case of the *Same Company v. German*, 31 C. P. 349.

The first point which suggests itself is, what was the true character of the transaction between the defendant and Mrs. Potter. Was it a purchase of the absolute estate, the payment of the mortgage being taken into consideration as part of the purchase money, in which case irrespective of the form of the conveyance she would come under a liability to indemnify her vendor against his personal obligation to pay the mortgage money, or was it a mere purchase of the equity, *valeat quantum*?

Little information is afforded by the instrument itself, which contains no recital of the intention of the grantee to purchase the fee, and does not in terms say that the lands are conveyed subject to the mortgage or contain any express covenant on the part of the purchaser to assume the mortgage, but merely excepts it from the grantor's covenants, so that it is not apparent upon the deed itself whether the purchase was of an equity of redemption and nothing more—a right to redeem the mortgage without an obligation to do so, which would not make the mortgage debt, the debt of the person purchasing—or whether it was in

fact a purchase of the whole estate it being understood that the mortgage debt should be part of the purchase money, in which case the grantee would be bound to indemnify her vendor.

So that we are driven to look at the evidence, and although the defendant does say in one portion of it, "I did not consider that Mrs. Potter was under any obligation to pay off the plaintiff's mortgage. I consider that if Mrs. Potter thought the property worth redeeming she would do so;" and in another: "I do not think there was any bargain between Mrs. Potter and myself, except what was expressed in the deed," I think he merely intends to say that he had never considered the effect of the sale upon the liability of the parties to it, and that the fair inference is (especially when we consider the defendant's action in describing the debt as an indirect liability in his schedule in the insolvency proceedings) that it was a purchase not simply of the equity of redemption, but of the entire interest in the estate; and that as between each other she became the principal debtor and the defendant the surety. This at all events is the view of the case most favourable to the defendant; but assuming this to be so, the mortgagee was no party to the arrangement, and it is no where shewn that he was apprized of the true nature of the transaction, and the deed itself as I have pointed out is consistent with either view.

Whatever was the actual transaction it could not in any way abridge or affect the plaintiff's rights or remedies. Is then the defendant's case at all advanced by what took place subsequently?

Potter says he was applied to by the plaintiff for the interest due on the mortgage, which he declined to pay, and he told him that if he chose to take the property for the debt he would give him a conveyance of it; the plaintiff on the other hand, who is a solicitor, and may be presumed therefore to understand the effect of what he was doing, says that when he found Potter unable to pay the interest he said to him, you had better give me your

equity, and denies that any thing was said about taking it for the debt, and adds that he took the deed to his wife to prevent a merger; and the learned arbitrator found that the defendant had not shewn any agreement that the release of the equity was taken in satisfaction of the debt, adding also that he was unable to find any express understanding or agreement that the mortgage debt should be kept alive. If it had been shewn that the plaintiff was aware that Mrs Potter was under obligation to indemnify the defendant and with that knowledge had agreed to indemnify her then there might have been much force in the appellant's contention that a case had been made out for the interference of the Court in order to avoid circuity of action, and so probably if with that knowledge he had chosen to accept the conveyance of the equity in satisfaction, but nothing of that kind is shewn here.

The conveyance to Mrs. MacDonald contains nothing upon its face to shew that it was intended to indemnify her grantor against any liability, or that it was intended to be in satisfaction, it is shewn that the Potters were not acting as agents of the defendant, and the arbitrator has held it not proved.

In the case of *Hood v. Phillips*, 3 Beav. 513, cited by the appellant's counsel, the owner of the estate paid off an incumbrance, a mortgage made by a prior owner which existed upon it, from her own money, but caused a transfer of the mortgage to be made to a person from whom on the following day she obtained a declaration that his name was used only in trust for her, and in which he agreed to convey to her or as she might direct at any time.

The presumption in such a case is that when the owner of an estate pays off a charge he does it for the relief of the estate, and this presumption had to be rebutted, and the taking a transfer to a trustee may be looked at as a strong circumstance to rebut the presumption, not however necessarily conclusive.

In that case, whatever might have been the motive of the owner at the time, there was nothing to shew that she

had any interest in keeping up the charge during the long interval, twenty-two years, between that transaction and the making of her will. At that time, being the owner of the estate and the supposed charge upon it, she devised the estate to John Lort Phillips in fee, in trust to pay an annuity and to raise certain sums on sale or mortgage, and subject to these charges she gave the estate to her godson Peregrine Lort Phillips, his heirs and assigns forever, adding the words "and upon or for no other use, intent or purpose whatsoever."

It would have been very difficult to suppose that the testatrix using such words intended the estate to be subjected to a claim by her residuary legatee for the sum charged on that estate. The occasion of making the will was such as to make it probable, to say the least, that the testatrix would have distinctly and unequivocally expressed that intention if she really had it.

In the present case the presumption would be altogether different; it would rather be that the plaintiff holding a covenant against a debtor did not intend to discharge it without payment. What evidence there is on the subject is in favor of that presumption.

I think that it is impossible to say that the learned arbitrator came to a wrong conclusion, and in my opinion his award and the judgment of the Court below should be upheld, and this appeal dismissed, with costs.

HAGARTY, C.J.O., PATTERSON and MORRISON, JJ.A., concurred.

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## BANK OF MONTREAL V. HAFFNER.

*Mechanic's lien—Prior mortgage—Delay—R. S. O. Ch. 120.*

The period of 90 days, limited by the 21st sec. of the Mechanics' Lien Act (R. S. O. ch. 120), for the commencement of proceedings to enforce the lien, applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that, whether proceedings have or have not been previously taken against the owner within the 90 days.

The plaintiffs, assignees of a mechanic's lien, brought an action against the owner and a prior mortgagee, but their action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien against the owner they brought this action after the lapse of more than 90 days from filing their lien, to obtain a declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land.

*Held*, [reversing the judgment of FERGUSON, J., 3 O. R. 183], that the lien had ceased to exist as against the mortgagee.

THIS was an appeal by the defendant Worswick from the judgment of Ferguson, J., reported 3 O. R. 183, where, and in the present judgments, the facts and authorities are clearly stated.

The appeal came on to be heard before this Court on the 23rd day of January, 1884.\*

*W. Cassels*, Q.C., for the appellant.

*Osler*, Q.C., for respondents.

March 28, 1884. OSLER, J.A.—The bill is filed by the plaintiffs, as assignees of a mechanic's lien, to declare their priority over a senior mortgagee to the amount by which the selling value of the land mortgaged has been increased by the work, materials and machinery placed thereon by the original lien holders, the Goderich Foundry and Manufacturing Company. The defendant Haffner is the assignee in insolvency of one Brodie, the owner of the land; and the defendant Worswick is the assignee of the mortgagees, the Worswick Engine Company (limited).

On the 10th March, 1878, and shortly after the date of the mortgage (13th Dec., 1877), the mill on the land was destroyed by fire, and Brodie, on the 24th June, 1878, con-

\**Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

tracted with the Goderich Foundry Company to refit the new frame with suitable machinery, which they did at a cost of upwards of \$4,000.

Before the work was completed the mortgagees obtained judgment against Brodie in an action for recovery of the possession of the premises, and issued a writ of *hab. fac. poss.* under which, on 9th July, 1878, the Sheriff formally delivered possession to their agent Worswick, without, however, actually putting Brodie out of possession. Upon the evidence I should be prepared, if necessary, to hold that it was not intended to disturb his occupation or the work in which the Foundry Company were engaged.

The mortgage had been given to secure in part the Company's claim for work, &c., done for Brodie upon the destroyed mill, and for the remainder of their claim they had on the 9th February, 1878, registered a mechanic's lien upon the premises in question.

On the 14th February, the Worswick Engine Company filed a bill to enforce the lien, and on the 29th May, 1880, obtained by consent a decree declaring that they had a lien upon the estate and interest of Brodie and Haffner in the lands, and referring it to the Master at Guelph to inquire, &c., with the usual directions as to subsequent incumbrancers.

Whether such a decree ought, in any case, to have been made, may admit of question, the buildings, work, materials, and machinery in respect of which the lien was claimed having been destroyed before the filing of the bill.

Under this decree the Master issued an order on the 25th April, 1881, setting forth that it appeared that the Goderich Foundry Company and the now plaintiffs ought to be made parties to the suit, and be enabled to attend the proceedings before him, and ordered them to be made parties and to be served with an office copy of the decree and the notice set forth in Schedule L., referred to in G. O. Chy. 245.

The plaintiffs took no notice of these proceedings, (having, already obtained a decree in respect of their own lien,) and by the Master's report, bearing date the 14th

June, 1881, reciting that they had been made parties to the suit as incumbrancers, and had been duly served with notice in accordance with Schedule T, to the G. O. Ch. 444, they were found not to have proved any subsisting lien on the premises; and the plaintiffs, the Worswick Engine Company, and two other persons named were found to be the only incumbrancers thereon.

It does not appear that any subsequent proceeding has been taken in that case.

The lien of the Foundry Company was registered on the 16/17 October, 1879, and on the 24th October, 1879, they filed a bill against the owner and the mortgagees to enforce it. The relief sought against the latter in that suit was precisely the same as that which is asked in this. The suit was dismissed as against the mortgagees for want of prosecution by an order dated the 15th February, 1881, and a decree was subsequently made therein on the 8th March, 1881 against Brodie and his assignee, the now defendant Haffner, declaring the plaintiffs, the Foundry Company, entitled to a lien upon the estate and interest of Haffner in respect of their claim. This decree directed a reference as to incumbrancers other than prior mortgagees, if any. It does not appear that any proceedings have been taken on the decree, and the plaintiffs having by it, as they say, established their lien as against the estate and interest of the owners, bring the present suit to enforce the priority given by the Act over the prior mortgagee.

The claim is resisted on the following grounds:

1. That as against the mortgagee the lien holder was bound to take proceedings within the same time that he was bound to take them against the owner, and therefore that the present action is out of time.

2. That the plaintiffs are foreclosed by the proceedings in the suit of the Worswick Engine Company, as they did not move to discharge the order making them parties or prove any claim.

3. That the plaintiffs allowed the bill in their former suit to be dismissed against the mortgagee, the now defen-

dant, and took a decree against the owner of the equity of redemption alone, subject to the rights of prior mortgagees and must realize their claim under that decree.

4. That the Foundry Company never had any lien in fact, having done the work upon an understanding that there should be no lien and in reliance upon other security.

The learned Judge, by whom the cause was tried, has found against this last contention as a question of fact, and I see no reason to disagree with him.

As to the other objections the first appears to be the only one which presents any serious difficulty.

I think the plaintiffs are not foreclosed by the proceedings in the Worswick Engine Company's suit. It is not necessary to decide whether they could in any case have been properly made parties to that suit, their lien not having arisen until long after its commencement.

They never were, in fact, made parties as incumbrancers for the purpose of proving their claim. They were improperly added as parties under G. O. Chy, 244, 245, for the purpose of enabling them to attend the proceedings, and were served with the notice in Schedule L, instead of being made parties as incumbrancers under G. O. Chy, 444, and served with notice T. Then, before any of these irregular proceedings had been taken against them, they had obtained a decree to establish their lien in an action of their own. I speak with hesitation in dealing with what is to some extent a mere question of Chancery practice, but having been referred to no authorities to the contrary, I cannot think that in such circumstances the plaintiffs having a regular decree in their own suit, are foreclosed by these irregular proceedings, followed by a report which does not appear to have been acted upon and which untruly states that they were made parties in the regular way.

There is probably also the further difficulty that they could not have proved their claim against the mortgagee's interest under the form of the decree in that suit.

Nor have I any doubt that the plaintiffs are not affected by the dismissal of their bill against the present defendants



or their assignors in the former action, or by the form of the decree therein. It was merely a dismissal for want of prosecution, not on the merits; and, assuming that this action is not brought too late, the fact that the plaintiffs did not prosecute their remedy against the mortgagees in the former action if they could have done so, is one which might have been taken into consideration in dealing with the costs of this one. In no other way that I can see does it affect the question.

Then is the action in time? The 21st section of the Mechanics' Lien Act enacts that every lien which has been duly registered under the provisions of sections 4 and 5 of the Act, shall absolutely cease to exist after the expiration of 90 days after the work has been completed or materials, &c., furnished, or period of credit expired, unless in the meantime proceedings are instituted to realize the claim under the provisions of the Act.

The plaintiffs contend that the limitation applies only to an action against the owner, and that if proceedings have been taken against him within the 90 days mentioned in section 21, under which the lien has been established, proceedings may be taken subsequently against the mortgagee to enforce the rights conferred upon the lien holder by section 7.

That section enacts that in case the land, &c., is incumbered by a mortgage, &c., existing before the commencement of the work, such mortgage shall not have any priority over the lien to any greater extent than the sum by which the selling value of the land, with such work, materials or machinery thereon exceeds the sum by which such selling value thereof has been actually increased by the improvement caused by such work, materials or machinery being placed thereon.

This case came before my Brother Proudfoot, some years ago, on demurrer of the mortgagee for want of equity, the only point taken being that he was an *owner* of the land within the meaning of the Act, and that proceedings not having been taken against him in time, the lien had ceased

to exist. The learned Judge, whose decision was followed by my Brother Ferguson at the hearing held that the mortgagee was not an owner within the definition of that word in section 2, sub-section 3 of the Act, viz.:—a person having any estate or interest, legal or equitable, in the land upon or in respect of which the work is done, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done,—inasmuch as, although the defendant had as mortgagee an estate, legal or equitable, in the land, yet it did not appear that the work had been done at his request, &c. The demurrer was overruled and the defendant left to set up in the answer any other facts necessary to bring him within the definition: *Bank of Montreal v. Haffner*, 29 Gr. 319.

The inference from the judgment is, that the lien might be enforced as regards the mortgagee's interest, though the action would have been too late as regards the owner.

In another case the mortgagee seems to have been deemed a necessary party when it was sought to affect his interest: *Douglas v. Chamberlain*, 25 Gr. 288.

I agree that he is not an *owner* within the meaning of the Act. But that does not determine the question before us.

What is meant by saying that the registered lien shall absolutely cease to exist after the expiration of 90 days, unless in the meantime proceedings are taken to realize the claim under the provisions of the Act?

Section 13 provides that such a lien as is in question here, may be realized in the Court of Chancery, according to the ordinary procedure of the Court.

I think that by instituting proceedings to realize a claim, is meant that they shall be instituted against all parties whose interests are to be affected by such proceedings.

There can be no doubt that a mortgagee is a necessary party to any action in which his security is to be affected, and the land comprised in it sold *in invitum* as regards him. And it would be placing a most inconvenient con-

struction upon the Act to hold that two suits are necessary or permissible—one to establish the lien and sell the owner's interest, and another to enforce the priority of the lien over the mortgage.

It was not argued, and in my opinion could not be successfully argued, that all the rights of the lienholder could not have been worked out in the former suit if the mortgagee had been retained as a party, and when my Brother Ferguson says that the relief which is asked in this suit could not have been obtained in the former, I understand him to mean only that the mortgagee was not a party to that suit, it having been dismissed as against him, and the decree taken subject to the mortgage.

The lien holder sues in order to realize his claim, not to establish his lien, which, where it exists, is established by the Act. If not paid it can only be realized by means of a sale of the property which is subject to the lien. The Act does not say against whom the suit shall be brought. The plaintiff is at liberty to confine it to the owner, and to take a decree, as he has already done here for the sale of the owner's interest, subject to the mortgage; but if he is not content with that, and desires to realize his claim by displacing to any extent the priority of the mortgagee, he can in my opinion only do so by making both owner and mortgagee parties for that purpose. As against the owner the second suit is superfluous and wrong; and as against the mortgagee the first having been dismissed as against him, was useless, as the rights of the parties must evidently, under section 7, be worked out by a sale of the whole estate in the land. It seems to follow that the action must be brought within the limited time against all parties whose rights it is intended to affect, and that if the relief asked for could not have been obtained in such an action, it was not a proceeding to realize the claim under the provisions of the Act, which could keep the lien alive as against persons whose interests were not affected by it.

In short the plaintiff is in this difficulty. His lien attaches, under sect. 6, upon the estate, legal or equitable

of the owner. The effect of section 7 is, that it has priority over an earlier mortgage to the extent of the increase caused in the selling value of the land by the improvements in respect of which it is claimed. *Broughton v. Smallpiece*, 25 Gr. 290. But, by section 21, unless proceedings are instituted to realize the claim within 90 days the lien ceases to exist, and the plaintiff has taken no proceedings within that time under which he could realize it as against the mortgagee.

I think the plain intention of the Act is, that proceedings shall be taken within the limited time against every one who can be affected by the lien.

The action is not one merely *in rem* against the land. "It is always *inter partes* and confined to such parties. The judgment binds only the interest of those who are parties to the proceedings:" *Phillips on Mech. Liens*, 2 Ed. 506.

I may refer to the case of *Dunphy v. Riddle*, 86 Illinois Rep. Sup. Ct. p. 22, not of course as an authority, but as shewing how a somewhat similar question was dealt with in that Court. The Illinois Act provides that "no creditor shall be allowed to enforce the lien created under the foregoing provisions, as against or to the prejudice of any other incumbrancer, unless suit be instituted to enforce such lien within 6 months," &c. A suit was commenced against Riddle, the owner, within the six months, and the plaintiff petitioned a few days after that time had expired to make one Gallagher, a subsequent incumbrancer, a party to the suit and enforce priority of his lien over Gallagher's mortgage, contending that it was only necessary to commence suit to enforce the lien against the owner and property within six months, and that at any time afterwards after the expiration of that time any creditor or incumbrancer might be made a party, and the lien enforced against him. The Court say: "We cannot adopt this as the true construction of this section, but think it to be otherwise; that the person against whom the suit must be instituted within the time limited is the one against whom the right of lien may be asserted. Such interpretation accords with the rule of



strict construction which has ever been applied to this and the like statutes." In *Crowl v. Nagle*, 86 Ill. 437, the same Court again laid it down that the Act required mechanics to enforce their rights against all parties having an interest in the premises by suit to be brought against them within the 6 months. See also *McKim v. Mason*, 3 Johns Md. Chy 186.

Upon the whole I think, with submission, that the decree should be reversed and the bill dismissed, with costs.

BURTON, J. A.—I agree with my Brother Osler in holding that the only proper construction of the words: "Unless proceedings are instituted to realize the claim," is, that mentioned by him, viz.: that to be effectual they must be against all parties whose interests are sought to be affected. The lien holder may be satisfied to proceed against the owner, the person entitled to the equity of redemption, in which case the interest of such owner will be sold subject to the mortgage, if he desires, in order to realize his claim to reach something which apart from the statute, would belong to the mortgagee, in other words to cut down the interest which the mortgagee would have at Common Law. I think he is bound to file his bill or take the necessary proceedings against the mortgagee to realize his claim from that interest within the period fixed by the statute.

I agree, therefore, in thinking the judgment below erroneous, and that this appeal should be allowed, with costs.

PATTERSON, J. A.—I agree, for the reasons fully given by my Brother Osler in his judgment, which I have had an opportunity of reading, that we should allow this appeal. I do not propose to say anything upon the questions he has discussed, beyond stating very briefly my view of the provisions of the Mechanics' Lien Act which are immediately in question, in doing which I shall probably add nothing to what my learned Brother has said.

By R. S. O., cap. 120, sec. 6, every lien under the Act shall attach upon the estate and interest, legal or equitable, of the owner, in the building, &c.

By section 21 the lien ceases unless within the prescribed ninety days, proceedings are instituted to realize the claim under the provisions of the Act.

By section 13 the lien may be realized in the Court of Chancery (when its amount is beyond the jurisdiction of the County Court or Division Court), according to the ordinary procedure of the Court of Chancery.

It is not said in section 21, against whom proceedings are to be taken. They are for the purpose of realizing the lien ; and, of course, of realizing it out of the property on which, under section 6, it has attached. That is the property in the building, &c. of the person who answers the definition of "owner," as given in section 2. It does not follow from this that the "owner" is the only necessary party to the action ; because certain rights which at common law would be paramount to those of the statutory owner, may be disturbed by the lien. A mortgagee whose incumbrance is of earlier date than the lien does not necessarily come within the definition of "owner," though he may be brought within it in case the work is done with his privity or consent.

Section 4 cannot be read, as suggested by Mr. Cassels, as extending the scope of the term "owner," although when brought, as that section is in the Revised Statute, into a relation to section 2 which it did not originally occupy, there certainly is not perfect harmony in the phraseology.

Here the defendant Haffner represents the owner, and the plaintiffs have already a decree on which they can realize their lien so far as it attaches on his estate, which is the equity of redemption.

The effect of section seven seems to be, that when the estate of the person who, in section two and section six is called the owner, is an equity of redemption, the mortgage or other charge loses its priority to the lien to the extent to which the selling value of the property has been enhanced by the work, materials or machinery of the lien holder. The lien holder becomes, to that extent, if not the first incumbrancer, an incumbrancer who ranks at least side by side with the mortgagee.

When the lien holder claims this position which derogates from the common law rights of the mortgagee, it is proper that the latter should be before the Court, whether he comes within the definition of "owner" or not. For this purpose I think the present defendant Worswick was properly made a party to the former action. He has a right to contest the lienholder's claim, by which his rights as mortgagee are directly affected; and, therefore, unless the lienholder is content to look merely to the equity of redemption, he must be a party to the action to realize the lien; and that action must be brought within the ninety days limited by section 21.

The argument that an action to *establish* the lien against one man being brought within the ninety days, is sufficient to save the lien under section 21, leaving the lien holder at liberty, at any distance of time afterwards, to bring other actions against the same or other men to *realize* his lien, has no support from the statute, from necessity, or from the analogy of other proceedings, as *e. g.*, an action to recover land or money when the statutes of limitation come in question; and it is opposed by obvious considerations of convenience.

The Mechanics' Lien Act should, of course, be so construed as to give all the rights it was intended to create, but at the same time, so as not unnecessarily to increase its unavoidable interference with the power of an owner to deal with his property, or of an incumbrancer to benefit by his security.

This action, being brought after the limited period, cannot avail to save the lien, which we must for all purposes of this action, regard as having absolutely ceased as against the mortgagee after the expiration of the ninety days.

The action therefore, as against the defendant Worswick, must be dismissed, with costs.

SPRAGGE, C. J. O., was absent when judgment was delivered.

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## O'BRIEN ET AL. V. CLARKSON.

*Assignment in trust for creditors—Powers of trustee to sell on credit—  
Power to pay liens in full—Bona fides.*

An assignment in trust for creditors, amongst, other things, authorized the trustee to sell for cash or on credit, and if on credit, with or without security for the balance of purchase money remaining unpaid, and also to pay in full any debts which constituted a lien on the assets where deemed advisable in the interest of the trust.

*Held*, [affirming the judgment of the Court below 2 O. R. 525] that the introduction into the trust deed of power to sell on credit, which was so given in good faith, did not invalidate the assignment.

*Held*, also that the discretion vested in the trustee to pay such liens in full did not invalidate the deed.

THIS was an appeal from the judgment of the Queen's Bench Division reported 2 O. R. 525, and came on to be heard before this Court on the 16th day of June, 1884.\*

The facts appear in the former report and present judgments.

*Gibbons*, for the appellants, contended that the deed of assignment was bad in authorizing the trustees to sell for cash or on credit and without rendering himself answerable to any extent in case of loss being sustained by non-payment of such balance; and also for that it did not provide for any definite division of the assets, as between private creditors or creditors of the firm, and also that it enabled the trustee in his discretion to pay any lienholder in full.

*D. E. Thomson*, for the respondent. The evidence sufficiently satisfied the learned Judge who tried the case without a jury, that the assignment here in question was made in good faith and for the purpose of satisfying ratably and proportionably, and without any preference all the debtors' creditors; and not with any intent to defeat any. The evidence also established that the terms and provisions of the instrument so strongly objected to by the plaintiffs were introduced at the instance of the creditors who signed

\**Present*.—BURTON, PATTERSON, MORRISON, and OSLER, JJ.A.



the deed and who represented a large majority of the claims payable by the debtors.

As to the payment of certain creditors in full, that was only to be done when deemed to be beneficial for the estate, and if any attempt were made at an improper use of the power the Court would control it.

*Gottwalls v. Mulholland*, 15 C. P. 63; *Squire v. Watt*, 29 U. C. R. 328; *Goss v. Neal*, 5 Moo. 19; *Alton v. Harrison*, L. R. 4 Ch. 622; *Janes v. Whitbread*, 11 C. B. 406; *Gordon v. Youny*, 12 Gr. 318; *Baker v. Dawbarn*, 19 Gr. 113; *Badenach v. Slater*, 8 A. R. 402, were referred to.

October 15th, 1884. BURTON, J. A.—The first objection to this assignment is disposed of by *Badenach v. Slater*, 8 A. R. 402.

The objection that the deed “does not provide for any definite or proper division of the assets as between the firm and private creditors” comes before us in a new shape. The rock upon which these assignments have generally been wrecked was in attempting to define with unnecessary particularity how the assets should be applied. The draughtsman here has, I think, wisely followed the words of the statute as nearly as possible, giving the assignee ample powers for realizing the estate and leaving the creditors to ascertain as between each other from what fund their claims are to be paid, the debtor declaring in express terms that he does not desire in any way to dictate how their several claims shall be paid beyond the fact that he desires them to be paid ratably and without preference or priority.

The other objection was not taken in the reasons of appeal, and is not noticed in the Court below, and I should assume was raised for the first time in this Court, but we think there is nothing in the objection. The deed merely vests in the trustee a discretion to pay in full whenever he deems it advisable in the interests of the trust, any debts which by law constitute a lien or charge upon any part of the assets. It is manifest that a trustee ought to be vested

with the means and discretion plainly essential to the proper execution of the trust. To relieve the property from incumbrances is clearly such a discretion. Such a trust, like all others, might be liable to abuse, but that can be no reason for not giving it. The law presumes that an assignee will do his duty. The question is, not whether a fraud may be committed by the assignee, but whether the provisions of the instrument are such that when carried out according to their apparent and reasonable intent, they will be fraudulent in their operation.

I think all the objections fail and the judgment below should be affirmed and this appeal dismissed, with costs.

PATTERSON, J. A.—The plaintiffs' reasons of appeal point out the two particulars in which he contends the assignment is vulnerable.

*First*, that it empowers the trustee to sell the estate "in whole, or by portions as he shall from time to time think proper, and in such manner, whether by auction, tender, or private sale, as he shall from time to time think advisable and for such price and upon such terms and conditions as to title, price, payment of purchase money, and with or without security for the unpaid purchase money, if any, and otherwise in every respect as he shall think advisable with power to rescind any contract of sale and to buy in and re-sell for the purposes of the trusts, without being responsible for any loss or deficiency on the re-sale."

*Second*, because it does not provide for any definite or proper division of the assets as between firm and private creditors.

The second reason is not supported by the form of the deed which does contain a definite direction for the distribution of the assets among the joint and separate creditors, to the same effect as that which was held good in *Badenach v. Slater*, 8 A. R. 402, and in the same case in the Supreme Court.

The first objection is, I think, also covered by the authority of *Badenach v. Slater*, 8 A. R. 402, and in principle

also by *Gottwalls v. Mulholland*, 15 C. P. 62, affirmed in appeal, 3 E. & A. 194.

Another point was argued which is not taken in the formal reasons of appeal. It was based on the proviso in the deed that "notwithstanding anything herein contained the said trustee shall have the right to pay in full, whenever he deems it advisable in the interests of the trust, any debts which by law constitute a lien or charge upon any part of the said assets."

The objection made to this is that it puts it in the power of the trustee to give an unfair preference to a creditor by paying in full a debt which may happen to be charged upon some asset of less value than the amount of the debt.

The object of this proviso, assuming of course nothing against the good faith of the transaction, may be taken to be to authorize the trustee to redeem any asset which was pledged to or charged in favour of a creditor, instead of allowing it to be sacrificed by the enforcement of the lien. He could not do this, in ordinary cases, except by paying the debt, which he might hesitate before doing, in face of the express trust to pay the debts ratably, if he had not the protection of such a provision as this.

It is true that a very literal reading of the proviso may seem to authorize the redemption of an asset by the payment of more than its value, though that intention, if it really lurks in the language used, is so well concealed that it escaped the acumen of counsel until the action had passed through the Court of first instance, and through the Divisional Court, and through the further examination and analysis required in settling the reasons of appeal and preparing the case for this Court.

The answer is, in my opinion, the same given in *Badenach v. Slater*, 8 A.R. 402, to an objection taken for the first time, as this was, during the argument of the appeal, to a discretion given the trustee to sell on credit, and generally on such terms and in such manner as he should deem best or suitable, *having regard to the object* of the deed; which we did not regard as taking the deed out of the saving proviso, or as indicating any actual fraudulent intent.

It is too late, after the numerous decisions upon the statute now in question, to contend that a debtor who assigns for the benefit of his creditors must simply assign his estate, without imposing any restrictions upon or giving any powers to his assignee with regard to the management or mode of disposing of the property.

The provision which is now attacked differs very materially from that which was dealt with in *Andrew v. Stuart*, 6 A. R. 495.

I think we should dismiss the appeal.

MORRISON, J. A.—I have had the opportunity of perusing the judgments prepared by the other members of the Court, and fully agree with their reasons for dismissing this appeal, with costs.

OSLER, J. A.—I am of opinion that the appeal should be dismissed. The assignment is not void under the statute of Elizabeth, and I think none of the provisions which have been objected to are in conflict with the R. S. O. ch. 118.

It does, on its face, profess to be for the benefit of creditors generally, ratably and proportionately, without preference or priority.

Mr. Gibbons objected very earnestly that the discretion vested in the trustee as to the exercise of the power of sale and in particular the authority to sell the estate with or without security, was so unreasonable that no creditor should be compelled to assent to it, and also because it made no proper or definite division of the assets between the firm creditors and the private creditors of the partners, and lastly, because authority was given to the trustee to pay in full any debt which constituted a lien or charge upon any portion of the trust estate.

As regards objections which are founded upon the *unreasonableness* of the terms of a deed of this nature, I cannot agree that a debtor has no right to impose conditions upon, or vest a discretion in, or give direction to the trustee



as to the manner in which the property may be realized so long as he does not withdraw it from his creditors.

I may quote what I said in the case of *Gallagher v. Glass*, 32 C. P. 641-652, not, of course, as authority, but as expressing the view I still entertain on the subject: "Where an assignment is not open to the objection that it confers a preference on a creditor or a class of creditors, not already preferred as holders of a lien or charge on the property assigned, the question must always be whether from the surrounding circumstances or the terms of the deed itself it appears to have been made *with intent* to defeat or delay creditors, and if the terms are such as before the Act such intent would not have been inferred from, the Act will not invalidate the deed. In other words a deed which would have been valid before the Act, will still be valid if no creditor is preferred thereby. To that extent therefore, and within those limits a debtor may 'dictate terms' to his creditors."

And with a slight modification I agree with what has been said by my brother Patterson, in *Badenach v. Slater*, 8 A. R. 402-411: "A deed of the kind may of course, like any other deed, be vitiated by fraud or bad faith, (which) may be evidenced by the terms of the instrument itself or by some provision unreasonable or extravagant in its nature, though it affects all creditors alike, or it may be shewn by evidence *dehors* the deed. Evidence of either kind may convince a Court that the real object and intent of the deed was to defeat and delay creditors, while it ostensibly put them all on the same footing." I would only modify this by saying that while some provisions may be unreasonable and extravagant in their nature, such for instance as a power to carry on the business not merely as subsidiary to the general purpose of sale and distribution, others may be so according to circumstances only; what would be fatal to the deed under some circumstances being unobjectionable in others.

The deed in this case, is, I think, quite within the cases of *Gottwalls v. Mulholland*, 3 E. & A. 194, and *Badenach v. Slater*, *supra*: for, first, the extrinsic circumstances

shew that there was no intent to defeat or delay creditors, but the contrary: second, by the terms of the deed the property is assigned for the purpose of paying all creditors ratably, &c.; and third, the clause as to the distribution of assets having regard to the rights of the joint and separate creditors, in itself persuasively just and equitable, was approved of in *Badenach v. Slater*.

I cannot say that the power to sell without security is in itself unreasonable. It might in other circumstances be so, but where the trustee is a person selected by the great body of creditors, for his known capacity and fidelity, and the terms of the deed are prompted and approved of by them, I do not see on what principle this Court, which has already determined in *Badenach v. Slater*, that a power to sell on credit will not vitiate a deed, is to declare that the power in question is in itself unreasonable or extravagant. And when the jurisdiction which a Court of Equity (to use the old phrase) exercises over a trustee, is borne in mind, in removing him and appointing a new one, when it may be necessary for the welfare of the beneficiaries and of the trust estate (*Letterstedt v. Broers*, 9 App. Cas. p. 371,) we should hesitate long before yielding to an objection raised by a creditor to an honest deed in order to secure for himself a priority which the very intention of the deed was to prevent him from obtaining.

The last objection is to the clause which confers upon the trustee the right to pay in full any debts which by law constitute a lien or charge upon any part of the trust estate, thus as it is urged enabling him to commit a fraud by preferring or paying in full a creditor who may have a lien for a debt of \$1000 upon property not worth \$100. If the terms of the deed by their legal construction conferred upon such a creditor priority over others having no lien it would of course be void as offending against the very words of the Act; but that is not the effect or meaning of the clause. It merely vests a discretion in the assignee to pay the creditor having a lien when he deems it advisable in the interest of the estate to do so. His power to commit a

fraud in such a matter is not facilitated by the terms of the deed. It is simply commensurate with the control which as trustee he possesses over the estate.

Since the above was written a partial report of the judgment of the Supreme Court in the case of *Badenach v. Slater* has appeared in the *Canada Law Journal*, vol. 20, page 306. It affirms the judgment of this Court. The opinions of Strong and Gwynne, JJ., as reported appear to support the view I have endeavoured to express.

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#### MALCOLMSON V. HAMILTON PROVIDENT AND LOAN SOCIETY

##### *Verdict of jury.*

The father of the plaintiff applied to the defendant company for a loan of \$2,500 secured by land valued by the company's appraiser at \$3,500.

In answer to certain questions put to the applicant, in a printed form of application for loan, he stated himself to be the owner of certain horses, cows, sheep, and other stock. The plaintiff was present with his father at the time of making the application, but swore that he was not aware of the answers given by him as to his personal effects. The defendants sued and obtained execution against the father, under which they seized some of the stock in the possession of the son, who had been residing apart from his father, and from whom, prior to the above application, he had purchased it.

In an interpleader issue between the son and the company the jury found in favour of the claim of the former, which verdict the Judge of the County Court refused to set aside.

On appeal this Court, although they considered that a verdict for the defendants would have been more satisfactory, refused to disturb the judgment, the question being one proper for the decision of the jury.

AN appeal by the defendants from the County Court of the County of Wellington.

The defendants made an advance of \$2,500 to Donald Malcolmson, the father of the plaintiff, upon the security of land mortgaged to them by the borrower, and valued by their appraisers at \$3,500.

The mortgage becoming in arrear, the defendants sued the father, and obtained judgment, and issued execution. Under the execution the sheriff seized certain live stock,

&c., which the plaintiff claimed as his property, and accordingly, upon the application of the sheriff, an issue was directed to be tried as to the ownership of the goods.

The issue was tried before the Judge of the County Court of Wellington and a jury, and a verdict for the plaintiff was entered.

The defendants' appeal was from the judgment of the county Judge discharging an order *nisi* to set aside the plaintiff's verdict and to enter a verdict for the defendants in respect of the whole or a portion of the goods in question, or for a new trial.

The evidence, so far as is material, is set out in the judgment.

The appeal came on to be heard in this Court on the 10th of October, 1884. \*

*Orerar*, for the appellants. The evidence in the case does not establish, except by the statement of the plaintiff himself, that he ever did purchase the goods alleged by him to have been bought from his father, and certainly there is not clear evidence of an immediate delivery followed by an actual and continued change of possession, as the statute contemplates; and the defendants were not only unaware of the alleged change of ownership, but were assured by the father in the presence of the plaintiff that he, the father, had been, and continued to be, the owner of the goods and chattels seized.

The plaintiff by his silence and acquiescence having permitted the defendants to act on the belief that his father really owned the property, should not be permitted at this day to assert an ownership in opposition to that of his father. If the plaintiff is now permitted to assert title it will make the defendants subject to the frauds practised by the father and son, for it is plain on the evidence of Mr. Leitch that the plaintiff was present when all the particulars were asked of the applicant for the loan; and the jury were really not justified in finding a verdict against

\**Present*.—HAGARTY, C. J. O., PATTERSON and OSLER, JJ. A.



the defendants ; this being so this Court would be justified in directing a verdict to be entered for the defendants.

*W. Bell*, for the respondent. The evidence was clearly such as should be submitted to the jury ; it was so submitted, and they chose to believe that given by the plaintiff in preference to the statements of the agent of the defendants. This is clearly one of those cases in which the Court will not assume the functions of the jury, although there may be a question on which side of the case the evidence preponderates.

Under the circumstances this is just such a case as this Court is constantly in the habit of saying that there being contradictory evidence they will not interfere with the verdict of the jury as well as the ruling of the learned Judge who saw the witnesses and heard them give their evidence.

*Doyle v. Lasher*, 16 C. P. 263 ; *Barker v. Leeson*, 1 O. R. 114 ; *Danford v. Danford*, 8 A. R. 518 ; *Pickard v. Sears*, 6 A. & E. 474 ; *Freeman v. Cook*, 2 Ex. 654 ; *Stewart v. Rounds*, 7 A. R. 515, were referred to.

October 20, 1884. The judgment of the Court was delivered by

HAGARTY, C. J. O.—Two questions arise in this case, 1st, as to the general merits of the finding ; 2nd, as to whether there was a sufficient delivery and change of possession.

As to the first. The interpleader issue was about six cows, two horses, harness, waggon, &c. According to the evidence only a couple of cows, a mare, lumber waggon, and fanning mill were purchased by the plaintiff from his father. The other things he swore he had bought elsewhere. The chief evidence relied on against him was that there was an *estoppel in pais* in consequence of his having been the witness to the application for a loan by his father to the defendants in January, 1879, in which it was stated that the father, the applicant, had on the farm three horses, eleven head of cattle, &c. The plaintiff swore very positively that although he knew the nature of the application for the loan, the amount, and discussed the

terms of payment, he did not read the answers, and knew nothing whatever of any representation as to the ownership of the cattle.

Leitch, the valuator, who took the application, says the plaintiff and his father came together to apply: that the plaintiff was present when the application was drawn: that he had a good deal to say as to regulating the payments, and was present when the questions were put as to the farm stock: that plaintiff made no claim to the cattle, &c., in his presence.

The plaintiff swears that he was not in the room when the questions were asked: that he was out in the stable. It was stated that the Loan Company were always particular in ascertaining the position of an applicant: that although the security is on the land they desire to know how the man stands as to chattel property.

An insurance policy effected by the plaintiff in his father's name nearly two years before was put in, the plaintiff signing his father's name. In this there was an insurance on live stock (not particularized) in the fields to \$200 from effects of lightning.

Plaintiff swears that there had been a previous insurance as far back as 1875 on the farm buildings and stock for his father: that the last insurance he had was with Chisholm, for the London Mutual Company, and that Chisholm by mistake insured the cattle as his father's: that after the insurance was effected he spoke to Chisholm about the mistake and that the stock was his: Chisholm told him that he (Chisholm) had made a mistake, but that it was all the same and that it made no difference; plaintiff believed him. This policy was assigned to the defendants when the loan was effected. Chisholm was not called and the case rested wholly on plaintiff's evidence.

Plaintiff swore that five years before the time of the trial (June, 1883,) he rented the farm from his father and at that time purchased these articles from him, paying him fully therefor: that after so purchasing he attended solely to these cattle and used them, and the articles wholly as

his own, and his father had nothing to do with them: that after renting the place to the plaintiff his father went away to Morefield and from that to the United States, and remained away most of the winter: he afterwards returned and lived with plaintiff on the place.

Plaintiff said that before the renting he and his wife did not live with the father, who was a widower; there was contradictory evidence as to where he and she were living prior to the renting.

Plaintiff says that he remained on the farm about three years, and a couple of years before the trial (some six months perhaps after the loan was obtained) he left the place, took away all the stock, and moved to another farm in a different part of the township.

The seizure on the defendants' execution against the father appears to have been about February, 1883, some months before the trial, when the goods seized must have been a year and a half away from the father's farm. The latter seems to have been previously taken possession of (through a tenant) by the defendants, and offered for sale under their mortgage.

On this head, the learned Judge told the jury that if they believed the plaintiff that he had rented the farm, and that he was there as tenant and occupant, and had the use and control, and exercised it, he was the man who had possession; was in actual and had continuous possession.

The direction may not have been sufficiently full and explicit, (as it is reported) but in the face of the facts sworn to, there would be little use in sending the case to a new trial on that point.

If the plaintiff told the truth, he went to live with his family on the place when he rented it, and bought the articles, and his father in a week or two went away and remained most of the winter in the United States, and eighteen months or so before the defendants' seizure he had removed all the stock away to another farm on which it was when seized.

I do not see how, if such be the facts, there could be any difficulty on the Bills of Sale Act.

On the general merits there was evidence for the jury to warrant their finding against the plaintiff.

If he stood by and allowed his father to assert the stock &c., to be his, and thus to induce the defendants to alter their position and act on such representations, it would not be permitted to the plaintiff, as against the defendants to assert his own right to what he allowed them to believe was the property of his father.

But this was undoubtedly a question of fact for the jury. The learned Judge seems to have called the jury's attention to this branch of the defence, and left it to them as to the two accounts given—that by plaintiff and that by Leitch—and that the question was, whether they believed plaintiff's account of it or not, and commented fully on the two statements.

He repeated several times to the jury (in effect) that their verdict must depend on whether they gave credit to plaintiff's account or not; that if they did not believe him their verdict should be for the defendants. They found for the plaintiff.

In the ensuing term a motion was made for a new trial on the two main grounds: no sufficient change of possession under the Chattel Mortgage Act and misdirection on that point, and that there was an estoppel proved by conduct. After argument the rule was discharged.

The learned Judge reviewed the evidence, and added that he was strongly impressed with the truthfulness of the whole of the plaintiff's evidence, and he perfectly agreed with the verdict.

I cannot say there was any misdirection. It was beyond question wholly a matter for the jury on the evidence, and the judge had to leave it with them. The jury was given very clearly to understand that it all depended on their belief in plaintiff's truthfulness, and every circumstance calculated to make them disbelieve it was fully before them.

I am not prepared to hold that this appellate Court must order a new trial on the weight of evidence. If



wholly left to us we should probably find against the plaintiff, but we must not usurp the functions of the jury, and, on the whole, I am not prepared to interfere. The learned Judge who saw the witnesses expresses himself strongly in favour of the verdict.

We think we should not disturb it.

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### HARVEY V. McNAUGHTON.

*Sale by insolvent—Payment of proceeds of sale to one creditor—Fraudulent preference—R. S. O. ch. 118.*

J. M., who was in insolvent circumstances, with the concurrence if not at the instance of his brother, who was liable as indorser on some of the insolvent's paper held by the defendants S. & M., effected a sale of all his (J. M.'s) stock-in-trade, book debts &c., to a *bonâ fide* purchaser at 60c. in the dollar; the proceeds of the sale he paid to S. & M., and they credited a portion thereof on the notes indorsed by the brother. *Held*, that this was not liable to be impeached as a fraudulent preference of S. & M.

THIS was an appeal from the judgment of Ferguson, J.

The plaintiffs were Alexander Harvey and R. W. Stirling, the defendants were John McNaughton, D. K. McNaughton, and John Stuart & T. H. McPherson.

The plaintiffs were creditors of the defendant John McNaughton, against whom on the 10th March, 1882, they issued a writ of attachment under the Absconding Debtor's Act.

On the 24th February, 1882, John McNaughton sold his stock in trade to one Escott at sixty cents on the dollar and his book debts to one Marx for \$200. He was then indebted to the defendants Stuart & Macpherson in upwards of \$1,600, part of which consisted of promissory notes to the amount of \$1,125, indorsed by the defendant, D. K. McNaughton.

Before he absconded he paid the defendants Stuart & McPherson out of the proceeds of the sale the sum of

\$1,411, of which \$976 was, by arrangement, between them and D. K. McNaughton, to be applied upon the notes.

In their statement of claim in this action the plaintiffs alleged that the defendant John McNaughton being insolvent, and being indebted to the other defendants, conspired with them to sell out his assets, and to give them a fraudulent preference over other creditors by paying over to them the proceeds of the sales. That the other defendants assisted him in taking stock and finding purchasers, and that he paid over to them the whole of the proceeds. It was further alleged that the defendants had notice of his intention to abscond, and of his desire and intent to prefer them, and that other creditors should get nothing.

The plaintiffs avered that they were proceeding to judgment and execution in the other action, and asked that these sales might be declared to have been "made with intent to give the defendants McNaughton and Stuart & Macpherson a fraudulent preference over the other creditors of John McNaughton, in pursuance of a conspiracy to that intent entered into between the defendants"; for an account of the moneys received by each of them, and for an order for payment over of the same to the sheriff of the County of Kent for distribution among the other creditors.

The defendants denied all charges of fraud, and conspiracy, contending that the money was paid to and received by them in good faith as a payment on account of their debt.

The action was tried at London at the November Sittings of 1883. The learned Judge made no special findings, and dismissed the action, considering himself bound by the case of *Stuart v. Tremain*, 3 O. R. 190.

From this judgment the plaintiffs appealed, and the appeal came on to be heard on the 30th day of October, 1884\*

*Gibbons*, for the defendants. The evidence establishes

\* *Present* : HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

clearly that John McNaughton at the time of the sale of his stock and book debts was utterly insolvent and had not any other assets whatever, of which fact all the respondents were quite cognizant, still in the face of these facts the insolvent handed over the whole of the proceeds of such sale to one firm who were creditors, in order that his brother might be benefited thereby to some extent, leaving all his other creditors totally unprovided for. He also contended that the rule in *Stuart v. Tremain*, 3 O. R. 190, should not be allowed to prevail; but that as the statute had declared the transfer void the Court should work out the remedy.

*W. F. Walker*, for the respondents Stuart & MacPherson. The evidence fails completely to bring home to these parties any knowledge whatever of the intention of *John McNaughton* to abscond. He did so after the transactions were all completed. The acts of D. K. McNaughton could not, under the circumstances here appearing, affect the rights of these respondents. The money paid to these respondents was received by them in the utmost good faith; no evidence whatever was adduced to create the least suspicion that their conduct was otherwise than *bona fide*. The appellants are forced to admit that the sale of stock and book debts was *bona fide* and valid and therefore do not seek to set aside the sale, but seek only to compel these parties to pay over the sum for which the sale was effected to the sheriff for the purpose of paying off the claims of attaching creditors, not the creditors generally of John McNaughton. Clearly this would be an improper disposition of the fund, the more so as the plaintiffs are shewn to be the only attaching creditors of the insolvent.

*M. Houston*, for the respondent D. K. McNaughton. The evidence establishes that no portion of the proceeds was paid to this respondent, so that under any circumstances there does not exist any ground for ordering him to pay. The transfer here was made for value to a *bonâ*

*fide* purchaser and the statute (R. S. O. ch. 118) no where declares such a transfer void no matter what the object of the seller may have been, unless such object is joined in by the purchaser.

*Watson v. Henderson*, 25 C. P. 562; *Nelles v. Paul*, 4 A. R. 1; *Labatt v. Bixell*, 28 Gr. 593; *Davis v. Wickson*, 1 O. R. 369, were referred to.

November 3, 1884. OSLER, J.A.—On the face of the transaction the case presented is merely that of a man in insolvent circumstances paying a favoured creditor, a thing not contrary to or prohibited by any law that I am aware of.

But Mr. Gibbons contended that the outward and visible form of the transaction was not its real form, but a mere cloak or device to cover an evasion of the statute R. S. O. ch. 118, sec. 2.

He urged that the effect of what was done was, in the first place, to transfer to the creditors the goods and chattels of the debtor, with intent to give such creditors a preference over his other creditors in contravention of the Act; and secondly, that the sale of the stock, &c., was really made by the preferred creditors, and that, as the transfer to them was avoided by the statute, they could not retain the proceeds of the sale as against other creditors.

It was also urged that if the sale was brought about at the instance, or by the procurement of the creditors, with an agreement or understanding that their debts should be paid out of the proceeds, the transaction would be equally an evasion of the Act, and the money thus paid would be recoverable by other creditors, or for the benefit of creditors generally.

Without conceding that either of these propositions is maintainable in point of law, we may first inquire whether the facts bear out Mr. Gibbons's contention.

The actual sale to Escott is not impeached, nor that it was made at a fair price.



Upon a careful examination of the evidence I am satisfied that the proper conclusion to be drawn from it is, that the sale was not brought about by collusion with, or at the instance, or by the procurement of the defendants Stuart & Macpherson.

I think that in making it John McNaughton was only carrying out an intention he had formed independently, (or perhaps at the instance of D. K. McNaughton) some time before. On the 6th February, 1882, we find him writing to Stuart & McPherson, regretting his inability to meet a draft due on that day, stating that he was going to advertise the business for sale, and asking them to help him if they had an opportunity of doing so. It is proved that he did in fact advertise for that purpose, and it does not appear that any subsequent communication passed between him and Stuart & McPherson up to the time of the sale. The defendant D. K. McNaughton was no doubt pressing to be relieved from his liability on the notes, and anxious that a sale should be effected, and it was evidently understood between him and his brother that the proceeds should be applied as far as possible on the notes.

Matters being in this state, John McNaughton, on the day before the sale, consulted with one Wilkins, a commercial traveller in the employment of Stuart & McPherson, who happened to be in Chatham, on the subject of his selling out the business. Wilkins suggested Escott, with whom there had been some previous negotiations, as a possible purchaser, and brought the two together. He advised McNaughton as to the price, and helped them both in taking stock for the purpose of the sale.

The sale was carried out, Escott gave his notes to John McNaughton for the price agreed on, and the latter discounted them at the bank, and received the money.

Immediately after the sale was completed, Wilkins, who up to that time does not appear to have been in communication with, or to have had any instructions from, his employers on this subject, sent them a telegram, the terms of which were not disclosed, in consequence of which they

sent up their solicitor to procure a settlement from John McNaughton. Before his arrival he saw D. K. McNaughton, who told him he expected John would pay the money, though he did not know how much, and that if it was paid, he expected he, D. K. McNaughton, would, to some extent, get the benefit of it. John afterwards paid \$1,411 to the solicitor, which was applied in the manner already stated.

The evidence is that John McNaughton's intention to abscond was unknown to any of his co-defendants when this payment was made. He afterwards told his brother that he was going away and borrowed \$60 from him for expenses.

I think we should not be warranted in finding as facts either that Wilkins was acting as the agent real or professed of Stuart & Macpherson, or that he was the moving party in bringing about the sale. He was the plaintiffs' witness, and he was not asked whether he was acting under the defendants' instructions or as their agent. It was sought rather to fasten the agency upon the solicitor, but it is clear that the only part taken by him in the matter was to receive the money and agree with D. K. McNaughton as to its application. The latter swears that he received no part of the proceeds of the sale. Upon the whole, the proper findings on the evidence appear to be that John McNaughton was the real vendor, and that the payment to the defendants Stuart & Macpherson was either a voluntary payment by him or one made at the instance of his brother.

On the facts therefore the action must fail as no creditor can impeach such a payment. Even if the proof had more nearly corresponded with the allegations, I think, as at present advised, that the plaintiffs would have had a difficult task to maintain an action which has at least the merit of novelty as regards the constitution of the suit and the nature of the relief sought.

HAGARTY, C. J. O., BURTON and PATTERSON, JJ.A., concurred.

*Appeal dismissed, with costs.*

## O'DONOHUE V. ROBINSON ET AL.

*Vendor and purchaser.—Sale of lands—Part of purchase money left with purchaser as indemnity—Effect of bond securing debt and costs on appeal.*

The plaintiff on the sale of certain lands to the defendant R., left in her hands a sum of \$200 of the purchase money as security against an execution in another action then in the hands of the sheriff against the plaintiff's lands. Subsequently the plaintiff appealed in that action, and on doing so gave a bond with sureties conditioned to pay the debt and costs.

*Held*, [reversing the judgment of the Court below] that the perfecting and allowance of such security operated as a supersedeas of the writ of execution, not as a stay thereof merely; and that the plaintiff was therefore entitled to recover the balance of the purchase money from R.

AN appeal by the plaintiff from the County Court of the County of York.

The plaintiff having sold certain land to the defendant Robinson brought this action against the purchaser and the defendant Martin, her agent, to recover the sum of \$200, part of the purchase money which the defendants refused to pay, alleging that they kept back that sum to answer an execution against the plaintiff's lands in the action of *O'Donohue v. Whitty*.

The contention of the plaintiff was, that the execution in question was no incumbrance upon his lands because of certain proceedings in appeal in *O'Donohue v. Whitty*. The plaintiff also alleged an express agreement on the part of the defendants to pay over the \$200 upon the filing and approving of an appeal bond in that action. The appeal bond in question was perfected before the commencement of this action.

The Junior Judge of the County Court, who tried the action without a jury, found in favour of the defendant upon both questions, and dismissed the action, reserving leave to the plaintiff to bring another action after the termination of the appeal in *O'Donohue v. Whitty*.

The plaintiff appealed from the judgment of the County Court, and the appeal was heard on the 20th day of October, 1884.\*

The other facts appear in the judgment of Osler, J.J.A.

\**Present*:—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, J.J.A.

*N Murphy*, for the appellant. The evidence we submit establishes clearly that it was distinctly agreed that the money was to be paid to the plaintiff on the appeal bond in the other action being allowed; therefore, though the execution remained in the sheriff's hands, it could not properly be deemed or taken to be a lien or incumbrance, as it was not so there for execution, and had been suspended; and it is shewn clearly that the defendants had taken possession of the property, and entered into the receipt of the rents and profits thereof, thus waving any objections to title: *Trust and Loan Co. v. Cuthbert*, 13 Gr. 412; *Re Ross*, 3 P. R. 394; *Hunt v. Cooper*, 12 M. & W. 664; *Rowe v. Jarvis*, 13 C. P. 499.

*J. F. Smith*, for the respondent. Here the learned Judge has found expressly "that the defendant always qualified any promise he made by adding, 'if the execution ceased to bind' or to that effect" and his finding upon the facts will not be interfered with on appeal. The mere giving of the appeal bond did not operate as a stay of the execution in *O'Donohue v. Whitty*, and the plaintiff should, under the provisions of the Act, R. S. O. ch. 28, have procured an order of the Court or Judge for that purpose. Even in that case, so long as the writ remained in the Sheriff's hands, it would form a lien on the lands of the present plaintiff.

Here the objection as to title was removable by the vendor, and even without any agreement as to possession, the taking of possession by the purchaser could not possibly amount to a waiver of the objection. See *Re Cloag and Millar's Contract*, L. R. 23 Ch. 326.

November 11th, 1884. HAGARTY, C. J. O.—The learned Judge of the County Court, says:

"I do not find any sufficient evidence to warrant me in holding that there was an express agreement to pay over the \$200 upon the filing and approval of the bond in appeal in the case of *O'Donohue v. Whitty*. I think that the defendant always qualified any promise he made by adding a condition, 'if the execution ceased to bind' or to that effect.

\* \* I think, therefore, on the evidence the plaintiff cannot



succeed unless the writ has been suspended, or in effect withdrawn either by the proceedings or has ceased to be in the sheriff's hands to be executed by force of the letter of Fitch and Lees. \* \* It is clear to my mind that the proceedings in appeal, including the filing and allowance of the bond, were not operative to prevent the *fi. fa.* lands continuing to bind the lands in question."

I accept the learned Judge's view of the effect of the evidence.

It seems to me, however, that the allowance of the bond in appeal where there was nothing to be secured but the payment of money and costs, did in effect operate to cause the execution to cease to bind. It amounts to a supersedeas of the execution, not merely a stay. When the defendant has fully secured the payment of the moneys represented by the execution, I cannot believe it was ever intended to continue an incumbrance on the obligor to tie up his real and personal property and prevent his dealing with it. Such a construction would probably in many cases interfere with his being able to furnish satisfactory security.

The Court below and the respondents here consider the execution remaining as an incumbrance or charge on the property. The attorneys issuing the execution had written to the sheriff stating the appeal, and that they would not ask for a return of the writ in his hands until the appeal was determined.

If the view below is right the consequences may be serious and embarrassing. Another creditor of the appellant may place his execution in the sheriff's hands. Is it to be postponed until the ultimate decision of the appeal in the other suit? It appears to me that it operates at once, and that the debtor's property has ceased to be affected by the execution in the appeal, and that the bond perfected and allowed stands wholly in lieu thereof.

My Brother Osler has reviewed the statute law on this subject. I fully concur in his conclusions.

We should require very strong language in our statute to warrant our holding that the security directed to be

given by the appellant for the whole money claim and costs in dispute should not have the sensible and intelligible effect given under the former practice to bail in error.

The subject is discussed in 1 *Archbold's Practice*, (12th ed.) 561 *et seq.*, at pp. 569, 570, the cases are given to shew that the engagement of the bail is absolute to pay the debt, that this cannot be discharged by rendering their principal, nor by his bankruptcy and certificate, or even by his being taken in execution on *ca. sa.*, for the same debt and damages and costs in error when judgment is affirmed.

It seems from the reason of the thing that the allowed security stands for all purposes, for the original debt and costs, so far at least as any proceedings are concerned to enforce the same, pending the appeal.

An earlier statute, 20 Vict. ch. 5, declared that proceedings in appeal should be deemed a supersedeas of execution from the time of the perfecting and allowance of the security.

I consider the directions in the Consolidated Act, (R. S. O. ch. 38, sect. 27) do not alter the law on this head, because the word supersedeas has been omitted, and "stay of execution," only used. Sections 28 and 29 seem clearly to point to this. I do not consider that on the evidence before us we should hold that the omission of the appellant to obtain a *fiat* from a Judge to stay is to defeat his right. That *fiat* might be required to prevent any improper or tortious action of the sheriff, but its absence seems to have had nothing to do with the difficulty between the parties. Had the sheriff persisted in acting the *fiat* could have been readily obtained by the appellant or probably by any one aggrieved or desirous of removing an apparent cloud on the title.

Its non-delivery to the sheriff cannot I think affect the legal result of the perfecting and allowance of the bond.

The facts found in the Court below do not shew that any express agreement was made that the respondents could hold the unpaid purchase money until the execution should be actually removed from the sheriff's office, but only to

withhold payment until the execution should cease to bind.

It is to be regretted that such heavy costs of litigation should result from a dispute about a matter so trifling, and so apparently easy of adjustment.

I think the appeal must be allowed, with costs.

PATTERSON, J. A., concurred.

OSLER, J. A.—The action is brought to recover \$200, balance of the purchase money of certain land sold by the plaintiff to the defendant Robinson, which the latter had refused to pay, on the ground that a writ of *fieri facias* in the hands of the sheriff of the County of York, in a suit of *O'Donohoe v. Whitty*, was an incumbrance on the land to the amount of the sum so retained.

The plaintiff's contention was, that as he had appealed from the judgment on which the *fi. fa.* in question was founded, and the bond or security in the appeal had been perfected and allowed under sec. 27, sub-sec. 4, of the Court of Appeal Act, the writ had ceased to bind the land, and therefore there was no reason why the whole of the purchase money should not be paid over.

At the trial the dispute between the parties appears to have been as to the actual agreement between them with regard to the payment of this \$200 ; the plaintiff asserting that the defendant had agreed to pay it over on the perfecting and allowance of the security on the appeal, while the defendant said that it was only to be paid if the effect of the stay of execution was to "relieve the land from liability to the writ." The learned Judge of the County Court adopted the defendant's version of the agreement and came to the conclusion that the stay of the execution under the Act was not equivalent to a withdrawal or suspension of the writ.

The plaintiff was accordingly nonsuited, with liberty to bring another action after the termination of the appeal.

It appears to me that if the former practice, and the course of legislation on this subject is considered, the *stay*

of execution mentioned in the Court of Appeal Act, secs. 26, 27, and 28, must be treated as equivalent to an actual withdrawal or suspension of the writ, so that it ceases to bind the property of the appellant.

The old rule was, that the writ of error was deemed a supersedeas of all proceedings on the judgment from the time of putting in and allowing bail on error, but if execution had been issued and acted upon, the subsequent allowance would not operate as a stay: *Meriton v. Stevens* Willes 271, 280; *Messiter v. Dyneley*, 4 Taunt. 289; *Meagher v. Vandyke*, 2 B. & P. 370.

By the 12th Vict. ch. 63, sec. 38, a Court of Judicature was established called the Court of Error and Appeal which now exists under the name of the Court of Appeal.

Section 40 enacted that upon the appellant giving security to the extent of £100 to prosecute the appeal, &c., execution should be stayed except in the following cases *inter alia* sub-sec. 1, when the appeal was from a judgment by which the payment of money was directed, the perfecting of the security should not stay the execution of the judgment unless the appellant should have further given security to the satisfaction of the Court appealed from to pay the amount of the judgment.

This section and its sub-sections are now found in the R. S. O. ch. 38, secs. 26, 27.

Order 27 of the Orders of the Court of Appeal, passed 3rd July, 1850, (2 Gr. Appendix,) provided that no writ of appeal should be a supersedeas of execution until service of the notice of allowance thereof, containing a statement of some particular ground of error intended to be argued, and that if such grounds appeared to be frivolous, the Court, might order execution to issue.

In *Gilmour v. Hall*, 10 U. C. R. 508 (1853), it was held, following the former practice, that the allowance of the appeal, with notice of the allowance and perfecting of security, did not operate as a stay of execution where the sheriff had actually seized before the allowance of the appeal. The sheriff's duty was to sell, and pay the proceeds into Court to abide the result.



Sir John Robinson in delivering judgment said: "There is nothing in our statute 12th Vict. ch. 63 or the rules which would warrant us in holding, contrary to the practice or principles which have always hitherto prevailed in England, that an execution commenced before an appeal has been allowed, must not be suffered to go on notwithstanding the appeal. We can find nothing in our statute or the rules which should lead us to place this matter on a new and peculiar footing, for the words that are used in the 40th section of the Act, that on the perfecting of the security *execution shall be stayed*, cannot, we think, without some clear legislative direction to that effect, be carried further than the very same words used in the English Acts and rules of practice, and our own statute of 34 Geo. III. ch. 2, which have never been held to mean more than that after such allowance and notice execution shall not go on the judgment, not that the completion of an execution shall be interrupted where it has issued and been acted upon before the appeal was allowed."

Following this decision in 1855, the Act 18 Vict. ch. 123, was passed, the preamble of which recites that the perfecting of the security for the appeal may be deemed notwithstanding the 12 Vic. ch. 63, *not* to be a stay of execution if execution shall have issued, and levy been made before security perfected (as laid down in *Gilmour v. Hall*, 10 U. C. R. 508,) "and that it is proper the perfecting such security should operate to save the party so appealing, and desiring to stay execution from being compelled to pay the judgment in the meantime."

Sec. 1 enacts, that on perfecting and allowing the security the appellant may obtain from the Judge a *fiat* to the sheriff to stay the execution, and it shall thereby be deemed to be stayed whether a levy has been made under it or not.

Sec. 2, if the money is made, but not paid over to the party who issued the execution, the sheriff shall repay it on demand.

Then came the 20 Vict. ch. 5. sec. 21 of which abolished the writ of appeal, and made the appeal a step in the cause.

Section 22, similar in terms to Order 27, *supra*, enacted that appeals from Courts of common law should be deemed a supersedeas of the execution from the time of the perfect-

ing and allowance of the security required 'by sect. 40 of the 12 Vict. ch. 63, "provided that if the grounds of error appear to be frivolous, the Court may order execution to issue."

Secs. 1 and 2 of the 18 Vict. ch. 123, and sec. 22 of 20 Vict. ch. 5, afterwards appeared, as secs. 17, 18, and 35 respectively of the Con. Stat. U. C. ch. 13.

In the Revised Statutes of Ontario ch. 38, sec. 18 of the C. S. U. C. ch. 13, appears as sec. 29, and secs. 17 and 35, as sec. 28, as indicated by the reference at the end of the sections, although in the revision the first part of section 35 referring to supersedeas of execution on appeals from Courts of Common Law has been omitted, the revisers doubtless considering that secs. 17 and 18 of C. S. U. C. ch. 19 sufficiently shewed that the stay of execution there referred to was equivalent to a supersedeas and that, the latter provision was merely superfluous and unnecessary when the procedure in appeals from all the Superior Courts had been assimilated.

A moment's reflection will shew that the expression "the execution shall be stayed" has a much wider meaning as here used, than it formerly had, or than it has when one is speaking of a temporary stay under a Judge's order pending some application in reference to the writ. In the latter case no doubt the stay does not affect its position as regards other writs. It is treated as being still in the sheriff's hands for execution.

But where execution is stayed on an appeal, it is evident that the intention of the Legislature was to substitute the security given on the appeal for the lien on the property of the appellant, leaving it free to be disposed of by him, and liable to the claims of his other creditors. The 29th section of the Act seems conclusive as to this, for even if the sheriff has sold the property seized, and made the money under the execution, he must, if he has not actually paid it over to the creditor, repay it to the party appealing, thus effectually removing it from the operation of the writ.

In the reasons of appeal it is objected that the execution was not stayed because the plaintiff had not procured the *fiat* of a Judge to the sheriff under section 28. No question was made as to this, previous to the action or at the trial, and we think the objection is not now open to the defendant, even if it be otherwise well founded.

No doubt it was present to the minds of both parties that the mere formality of procuring the *fiat* could be complied with at any time if anything had turned upon it. The defendant's position really was, that with a *fiat* or without one, the stay of execution left the writ as an incumbrance on the land.

Being unable, for the reasons I have stated, to agree with that view, I think the appeal should be allowed.

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## MCGARVEY V. THE CORPORATION OF THE TOWN OF STRATHROY.

*Municipal By-law—Paving streets—Damages—Negligence—Compensation under statute—Action at law.*

In pursuance of the powers conferred by secs. 551 and 553 of the Municipal Institutions Act, R. S. O. 174, the council of the defendant municipality passed a by-law authorizing the paving of F. street with cedar blocks, which work was proceeded with, but executed in such a manner as to cause water to flow over and rest upon the lands of the plaintiff.

*Held*, [affirming the judgment of PROUDFOOT, J., who found that the work had been negligently performed], that the plaintiff was entitled to recover the amount of damages sustained by her, and to enjoin the defendants from further overflowing her land; and that in consequence of such negligence her proper remedy was by action; not by a proceeding under the statute for compensation.

THE plaintiff by her statement of claim set up, that she was the owner of lot N, on the north side of Front street opposite to the northerly extremity of Colborne street in the town of Strathroy: that the defendants in the construction and grading of Front street to the east and west of the plaintiff's lands and of Colborne street to the south, and by the construction of drains and sewers on said streets, and of a culvert across Front street from Colborne street to the plaintiff's land, wrongfully and negligently collected the surface water and refuse from both streets and caused the same to flow in a stream across the plaintiff's lands to the Sydenham River, causing great damage thereby: that defendants had permitted said streets to become and remain in a bad state of repair although duly notified: that it was not necessary to the proper drainage of said streets to collect said surface water and refuse, and conduct same through the plaintiff's lands, but that the same could have been conducted more conveniently and naturally by a different course.

The plaintiff claimed damages and an injunction.

The defendants set up in their statement of defence: That Front street had been laid out by private parties prior to 1859, when the town was incorporated: That the said streets naturally sloped towards the plaintiff's lands, and



the water flowed from said streets thereon: That the defendants in grading the streets and constructing ditches thereon did not change the original or natural inclination thereof, nor did they increase or divert the flow of the water thereon: That the culvert from Colborne street was put in where the water naturally crossed Front street: That the defendants had, under the authority of the 551 and 553 sections of the Municipal Act, passed a by-law to pave with cedar blocks part of said Front street lying west of plaintiff's lands, and they had so paved it in a *bonâ fide* exercise of the powers conferred upon them by the said sections, and that due care was taken and the work done in a proper manner, and the plaintiff was not injuriously affected to any greater extent than was necessary.

It appeared in evidence that no under drains or gratings were provided in the pavement of the town block lying immediately to the west of the plaintiff's lands, and the water, therefore, from nearly the whole length of this block, flowed along the surface of the block pavement, and from thence to the plaintiff's lands.

The cause was heard before Proudfoot, J., on the 13th June, 1883, at the sittings at London, when at the close of the case judgment was given in favour of the plaintiff, his Lordship stating:

If I had to decide this case on the question of whether or not this culvert was put in on the lower side of the street I would feel considerable difficulty in dealing with it. So many witnesses have been examined, I suppose all Strathroy that knows any thing about it has had an opportunity of speaking upon the subject here, and there is much discrepancy in the evidence of the witnesses upon the subject. There is no doubt a great deal to be noticed with regard to the means of observation of these different witnesses, many of them, I think more, probably, on the part of the defendants than the plaintiff, were persons who had no particular reason for noticing the particular, the exact point where the water crossed the street. Nearly all of those examined on the latter day of the trial had no special reason for having attention directed to it, and only spoke of a recollection of a fact occurring many years ago, and one could hardly imagine that they could have retained in their memory the exact spot within one or two feet, or a half a dozen feet of where the water crossed the road, and as to the peculiar formation of the road and how it was affected by the draining, the ploughing up the soil,

and so on. My inclination would rather have been to have placed more reliance upon the evidence of those who were specially affected by it, and Mr. Geary, who seems to be in no way interested in this dispute and to have owned the adjoining lot, I think to the plaintiff, gives his evidence, shewing that at that time before the culvert was put in all the water over flowed on to his lot. Now that couldn't have been the case if this place where the culvert was put in was the right spot. However, in the view that I take of the case I don't think it is necessary for me to decide that point, because I think upon the other ground, that is upon the larger quantity of water thrown upon the property by means of the block pavement, I think the plaintiff is entitled to judgment. The evidence of Mr. Manigault shews that the inclination of this street from Caradoc street to Colborne street was changed, and that the water for a considerable portion of that distance, which would have flowed in a different direction, was by the action of the corporation in having that street built thrown into the culvert, and therefore thrown on to the plaintiffs property.

Now I have no doubt whatever that the defendants are liable for so constructing the drains. There is no question that they have the right to pass a by-law for the block pavement, and no question that they had the right probably to make the culvert where they did make it. That was proper matter for their consideration as the managers of the town and persons who had to deal in the interest of the town, but the law says that if in the carrying out of these duties imposed upon them, or that they think proper to exercise, for the benefit of the town they commit an injury upon a private person that they must compensate for that injury; and I think it was the duty of the corporation before inflicting the injury to take care that they had the means of satisfying the owner of the property for what they were about to do. I don't think that the corporation can now say, "O, you might have forced us to an arbitration, and you should have done that."

I think it was the duty of the Corporation to do it, and if they didn't do it, and didn't compensate the plaintiff for the injury to her property, that she was entitled to bring an action against them.

I don't think the statute of limitations can affect the right of the plaintiff to bring her action here. This is a continuing injury, an injury that is going on from day to day, although the time when she brings the action may influence the decision in regard to damages she would be entitled to. I don't think it interferes with the right of action itself, but at all events, as Mr. Meredith has remarked, it only is a protection where the work has been lawfully done. Here the work, according to my view of the case and according to the evidence of the witnesses for the defendants themselves, has not been properly done. Mr. Manigault told us this morning, I think, that the flow of the water from the block pavement might have been properly provided for, and Mr. Smith, who was one of the chief men in the corporation in regard to public works, says that the whole injury to the plaintiff's property might have been prevented at an expense of from \$30 to \$40, and I must say that I am surprised that such an action had been permitted to be brought and been permitted to be prosecuted to such

length when the whole injury might have been avoided at such a very slight expense.

I think the plaintiff entitled to a decree with a reference as to the damages she had sustained, and that she must have costs to the hearing, and an injunction restraining the putting on the water. Further directions and costs reserved. I can only enjoin the defendants from putting on any further water than has been accustomed to run, to flow there. It is very difficult to determine matters even upon the injunction, and I think it is a pity there should be any further litigation about the matter.

From this judgment the defendants appealed. The reasons assigned in support of the appeal were :

“That the evidence shews that the defendants in paving with cedar blocks that part of Front street in the town of Strathroy, lying between the intersections of Caradoc and Colborne streets with Front street, kept within the line of the street as originally laid out, and did not change the original level thereof to the prejudice of the plaintiff : *Regina v. Ferth*, 14 U. C. R. 156.

“That the evidence shews that the defendants paved said streets under a by-law passed by them for that purpose under the authority of the 551 and 553 sections of ch. 174 of the R. S. O. and that such pavement was so constructed in a *bona fide* exercise of the powers conferred upon them by the said sections, and due care was exercised in constructing said pavement, and was so constructed in a proper and workmanlike manner, and the plaintiff was not injuriously affected to any greater extent than was necessary for the due execution of the work ; and the plaintiff's remedy, if any, is for compensation by arbitration under the 486 section of the Municipal Act.

“That the evidence shews that the lands described in the pleadings were benefited by said pavement, and that the judgment should have directed the Local Master to take an account of the benefits and deduct the same from the damages, if any.”

The reasons assigned by the respondent in support of the judgment were :

“The evidence shews that large quantities of surface water and refuse matter were collected by the appellants upon Frontstreet in the said town of Strathroy, and discharged upon lot ‘N,’ on the north side of Front street aforesaid, none of which would naturally flow there : *Rowe v. The Corporation of Rochester*, 29 U. C. R. 590.

“The evidence shews that other and better means of drainage could be had by taking the surface water eastward, a shorter route to the river and along the highway at a trifling expense.

“The evidence shews that the drains were not properly constructed, and that the appellants were guilty of negligence and want of proper care in the construction of drains and the collection of surface water : *Stonehouse v. Enniskillen*, 32 U. C. R. 562.

"The evidence shews that the By-Law as to the block pavement does not extend beyond the western limit of Colborne street, and that Lot N, whereon the water flows, lies east of the west limit of Colborne street, and that section 486 of the Municipal Act does not apply.

"That the By-Law under which the block pavement was constructed does not apply to the question of damage or authorize the acts and omissions of the appellants. *Coe v. Wise*, L. R. 1 Q. B. 711.

"The evidence shews that the Commissioner who was appointed under said By-Law to ascertain what lands were to be immediately benefited by the construction of said pavement did not include lot 'N,' amongst the lands benefited, and that therefore no account of the benefit could be taken, none having accrued.

"The evidence shews that the drains, even if within the authority of sections 551 and 553 of ch. 174, R. S. O., were not kept in repair as required by section 554 of said Act.

"The evidence shews that the water and refuse matter coming from the street caused a nuisance, and the flow thereof should be stayed. See *Caukwell v. Russel*, 26 L. J. Ex. 34; *Goddard on Easements*, 342; and *Fritz v. Hobson*, 14 Ch. D. 542.

The appeal came on to be heard before this Court on the 9th February, 1885.\*

*Moss*, Q.C., and *J. Cameron*, (of Strathroy,) for the appellants.

*Osler*, Q.C., and *Folinsbee*, for respondent.

The authorities cited appear in the reasons for and against the appeal, and in the judgments.

March 3, 1885. HAGARTY, C. J. O.—An examination of the evidence satisfies me that the learned Judge has arrived at a correct conclusion on the facts before him, in substance that the defendants have in their exercise of their municipal powers caused a larger quantity of water to flow on plaintiff's land to her injury than would naturally have flowed thereon. From the early days of our municipal system I think it has been uniformly held that such proceedings give a cause of action. *Brown v. Municipality of Sarnia*, 11 U. C. R. 87; *Perdue v. Chinguacousy* 25 U. C. R. 61; *Rowe v. Corporation of Rochester*, 22 C. P. 319; and other cases may be referred to.

It was argued before us that the reference must be con-

\* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, & OSLER, JJ. A.



fined to damages to the property itself, and that the injury to the trade of plaintiff's husband, as a wagon maker could not be recovered by her.

I can find no trace in the appeal book of any such question or distinction having been suggested at the trial.

The plaintiff and her husband reside together on the lot,

I see no reason for interfering with the judgment directing the reference "to ascertain and state what damage, if any, has accrued to the plaintiff" by reason of the defendants having thrown more water on the plaintiffs land than would naturally have flowed there."

I think the appeal must be dismissed, with costs.

As negligence is charged and found by the learned Judge I do not think it necessary to discuss any question as to the remedy being confined to compensation under the statute.

BURTON, J. A.—Whilst agreeing in the result, I wish to place my judgment distinctly on the ground that it is alleged in the complaint and found by the learned Judge that the work was not properly or skilfully performed.

The Privy Council, which is the ultimate appellate tribunal from the decisions of the Courts of this Province, has distinctly laid down the law applicable to cases of this kind in these terms: *Montreal v. Drummond*, 1 App. Cas. 384.

Upon the English legislation upon these subjects, it is clearly established that a statute which authorizes works makes their execution lawful and takes away the right of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it, but it is a well understood rule in England that though the action is taken away compensation is only recoverable when provided by the statutes, and in the manner prescribed by them. In practice it is generally provided in respect of all Acts by which lands are "injuriously affected," words which have been held by judicial interpretation of the

highest authority to embrace only such damage as would have been actionable if the work causing it had been executed without statutable authority.

The same rule has been held to prevail in the United States, where it is held that Municipal Corporations acting under authority conferred by the Legislature to make and repair or to grade, level and improve streets, if they exercise reasonable care and skill in the performance of the work resolved upon are not answerable to the adjoining owner whose lands are not actually taken, for consequential damages to his premises unless there is a provision in the statute creating the liability.

In the leading case in New York, *Wilson v. New York* 1 Den. 595; the City raised the grade of streets, forming an angle on two sides of the plaintiff's premises without making any drain or sewer, and thereby obstructed the natural flow of water, and caused it to run from the street and from adjacent lands upon hers, and to stand there for several months in the year. In her declaration she alleged that the work had been *carelessly* done, but I suppose that she failed to sustain this allegation in evidence for the Court held that it was "*damnum absque injuria*."

Our municipal Act before it was amended in 1873 provided only for compensation by the corporation where lands were taken, but the amendment extended it to cases where lands were injuriously affected by the exercise of its powers, so that before the passage of that Act, if I read the English authorities aright, the plaintiff would have been without remedy unless she establishes the negligence of the corporation or its agents in the execution of its works. The amendment is a very salutary one, but it is right that the party injured should be confined to that remedy, inasmuch as the arbitrators awarding the compensation are to estimate the damage sustained beyond any advantage which the claimant may derive from the work.

Whether I should have come to the same conclusion as the learned Judge upon the evidence as to the want of proper care in the construction of the work is not now

material. The learned Judge was in a better position to form an opinion upon the evidence, and I do not feel at liberty to disregard his finding, but I wished to place upon record my views upon the general question as to the liability of municipal bodies to actions of this nature where the powers exercised are imposed upon them by law, or are within their statutable authority, and they construct the works with reasonable skill and care.

Upon the findings I agree that the action is maintainable

PATTERSON, J. A., agreed in the result.

OSLER, J. A.—I think the judgment of my Brother Proudfoot is right upon the evidence, and on the ground on which I understand him to put it.

It is of course perfectly well settled that if the injury complained of is one which is the subject of compensation, properly so called, the right to it must be worked out under the statute, and an action will not lie merely for doing the work which caused the injury, since that work was done by authority. But, as Wilson, J., pointed out in *Hodgins v. Huron and Bruce*, 3 E. & A. 169, 193, "if \* \* the defendants have done their work so negligently and unskilfully that by reason *thereof* the plaintiff has sustained special damages he may, notwithstanding the statute, still maintain an action for redress in respect of the special damage accruing from the negligence."

That was said in reference to the Municipal Act in force in 1866, (sec. 323), but it equally applies to the present Act which extends the right to compensation for damages to real property injuriously affected by the exercise of the powers of the corporation.

The damages for which compensation is given must, however, in all cases be such as *necessarily result* from the exercise of the powers of the Corporation, and therefore are not such as arise from negligence in doing the work.

That is what the plaintiff complains of here. It was not a necessary result of the work authorized by the by-law, that the plaintiff's land should be flooded; that has been caused by the doing of the work in an improper and negligent manner, in other words in an unauthorized manner. See *Jones v. Stanstead R. W. Co.* L. R. 4 P. C. 98, 115. *Mayor of Montreal v. Drummond*, 1 App. Cas. 384.

*Appeal dismissed, with costs.*

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LEWIS V. BROWN, BALFOUR & CO.

ELLIOTT V. BROWN, BALFOUR & CO.

*Sale of all the stock and assets of an insolvent trader.—Pressure.—Want of evidence of intended fraud.*

A trader who was in insolvent circumstances, and for whom the plaintiff E. was liable as indorser on notes discounted at a bank and then current, was urged by him for a settlement and security, which, however, he refused to give, but offered to sell E. the whole of his stock in trade, household furniture, &c. E. accordingly bought it, paying the vendor \$1,400, the excess in value of the goods, over and above the notes, which he retired the same day.

Next day the vendor absconded, but the evidence failed to satisfy the Court that E. intended to commit any fraud in the arrangement so carried out.

*Held*, [affirming the judgment of the Court below] that although E. was aware that the debtor was in pecuniary embarrassments, the transaction in the absence of proof of *mala fides* was not liable to be impeached as a fraudulent preference.

THIS was an appeal from the County Court of the County of Oxford, in which verdicts had been given in favour of the plaintiff on interpleader issues ordered to be tried between the respective parties, to test the title to certain goods and chattels consisting of a stock of goods, in a store and certain household effects seized by the sheriff of the County of Oxford, under a writ of attachment issued against one S. A. Elliott, at the suit of the defendants Brown, Balfour & Co., tested the 19th day of April, 1882.

The plaintiff, Thomas Elliott, claimed the goods under a bill of sale thereof, executed the 13th day of April, 1882,



by S. A. Elliott, who absconded from Canada the day following.

On the same day that he purchased, Thomas Elliott sold the goods in the store to the plaintiff Lewis. Before Lewis completed the purchase, however, by payment of the purchase money, he was notified by the defendants that they claimed the transfer from S. A. Elliott to Thomas Elliott to be fraudulent and void.

The issue in the case of *Lewis v. Brown*, was in respect of the goods and chattels at the store.

The issue in the *Brown v. Elliott* case was as to the household furniture.

The issues were tried at the sittings of the County Court of the County of Oxford.

The plaintiff, Elliott, was examined at the trial, and swore that the debtor, when applied to, refused to come to any settlement or give any security, but offered to sell out his entire stock, furniture, &c. Upon an examination of the whole, it was estimated as being worth \$4,500, but subsequent removal of articles reduced this sum, and Thomas Elliott agreed to pay, and did pay him a lump sum of \$1,400, and procured a bill of sale to be executed in his own favour and duly proved. In addition to the \$1,400 so paid to the debtor, the plaintiff Elliott paid, on the same day, \$1,735 to retire the notes of S. A. Elliott, on which he was indorser in the bank.

In the course of the evidence, it was proved that Thomas Elliott and S. A. Elliott were not related in any way.

The day following the completion of the transaction, S. A. Elliott absconded.

The jury found for the plaintiff in the issues respectively. The learned Judge refused a rule to set aside the verdict, the evidence in the opinion of the Court failing to establish any fraudulent contrivance between the parties.

Against this judgment the defendants appealed, and the appeal came on before this Court on the 21st October, 1884.\*

\* *Present* : HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

*Gibbons*, for the appellant, contended that the respondents (Lewis and Elliott) had ample knowledge of the insolvent circumstances of the debtor, S. A. Elliott, and that he was about to leave the Province, and the purchase by Thomas Elliott was a means by which he had been enabled to obtain payment in full of his own claim, while the other creditors received nothing.

*Robinson*, Q. C., for the respondents, urged that the evidence failed to establish any *mala fides* on the part of either Lewis or Thomas Elliott; no matter how objectionable the conduct of the attachment debtor might have been; and therefore there was no ground on which their right to the goods, &c., could be impeached.

The cases cited are mentioned in the judgment.

November 20, 1884. PATTERSON, J. A.—The verdicts for the plaintiffs in these issues were moved against as being contrary to law and evidence, and against the Judge's charge.

No objection was taken on the ground of misdirection or non-direction.

We must, therefore, assume that at the trial the defendants were satisfied with the way in which the questions were presented to the jury. The learned Judge left to the jury the two questions involved in the application of the statute; R. S. O. ch. 118, sec. 2, viz.: the insolvency of the debtor, and the intent with which the sale to the plaintiffs was made. A perusal of the short hand reporter's notes shews that there was evidence from which the jury might have concluded that the debtor was not insolvent, but had, perhaps with the design to abscond as he ultimately did, been accumulating money instead of paying his debts, and that the \$1,400 received from the plaintiff was only a part of what he carried off with him.

The learned Judge, not having been so far dissatisfied with the verdict as to think it necessary to disturb it, we ought not to do so when we find evidence on which the verdict can be properly sustained.

I agree, therefore, that the appeal should be dismissed, with costs.

OSLER, J. A.—I think we ought not to interfere.

The observations of Tindal, C. J., in *Belcher v. Prittie*, 10 Bing. 408, 414, applicable to any case in which it is sought to disturb the finding of a jury on facts properly submitted, are specially appropriate here. In that case the question was, whether a transfer had been made voluntarily by way of fraudulent preference or in contemplation of bankruptcy. The jury found that it had not, and on the motion to set aside the verdict on the ground that it was against the weight of evidence, the Court said: "The question is not whether we are absolutely satisfied with the present verdict. \* \* Where a case involves not matter of law, but that which is purely a question of fact, and that fact has been submitted to those whom the law has constituted *judices facti*, we are not at liberty to take away from the party the right which he has acquired from the mouth of the jury, though we may entertain some degree of doubt whether they have come to a right conclusion. \* \* \* The question, what is the intention of a man in performing a certain act is to be judged of not by the judges of the land, but a jury. It is a question involving the consideration of fraud which, upon all occasions, has been said to be safely and peculiarly for the consideration of a jury." See also *Solomon v. Bitton*, 8 Q. B. D. 176; *Bright v. Eynon*, 1 Burr. 390-3; *Managers of the Metropolitan Asylum District v. Hill*, 6 App. Cas. 193.

There were here two questions for the jury, which were properly submitted to them by the learned Judge, viz: (1) Whether S. A. Elliott was, at the time of the sale to Thomas Elliott, in insolvent circumstances to the knowledge of the latter: and (2) whether the sale was made with intent to defeat and delay the creditors of S. A. Elliott, or to give Thomas a preference over the other creditors of S. A. Elliott.

As to the facts, there is not much, perhaps not any, room

for doubt that Thomas Elliott bought the debtor's stock in order to secure his own debt. He was alarmed and anxious about it, and was pressing for a settlement. If S. A. Elliott had, in the circumstances, given him a chattel mortgage or other security, there is ample evidence of the exercise of honest pressure sufficient to sustain it. But, as the debtor had his own way, and would only settle on his own terms, pressure is out of the question. Then, did the creditor know that he was in insolvent circumstances?

In *Pennell v. Reynolds*, 11 C. B. N. S. 709, Mr. Justice Willes says (p. 722): "A person dealing *bonâ fide* with a bankrupt would be safe. Unless he knows, or from the very nature of the transaction, must be taken necessarily to have known that the object was to defeat and delay creditors."

In *re Colemere*, L. R. 1 Ch. 128, it was held that in order to make an assignment of all his property by a trader as security for an advance of money fraudulent, the lender must be aware that the borrower's object was to defeat or delay his creditors. And *Baxter v. Pritchard*, 1 A. & E. 456, decides that an assignment by a trader of his whole stock, with intent to abscond from his creditors and carry off the purchase money is not an act of bankruptcy, so as to enable the assignees subsequently appointed to recover possession of the goods, if the purchaser had paid a fair price for them, and was ignorant of the trader's design.

Now, there is in this case, undoubtedly, a good deal of evidence which would have justified a jury in finding not only that S. A. Elliott was in insolvent circumstances, but also that the defendant knew that he was. On the other hand, there are facts which could not have been withdrawn from them pointing to a different conclusion. The debtor was not being pressed by his other creditors; he was advertising his business for sale, and had openly spoken of his intention to leave the country when he had disposed of it. He told the defendant that he wanted to pay his creditors, and did, in fact, apply some \$500 of the



purchase money of the goods to that purpose. He, himself, and his bookkeeper, White, told the defendant that his property exceeded his liabilities, and that there was enough to pay every person and more. White was a witness, and if the jury believed him, S. A. Elliott had means sufficient for that purpose. Whether he intended to apply them honestly is another thing.

If the jury came to the conclusion either that the debtor was not insolvent, or that the defendant did not know that he was, they would not have much difficulty in finding, and, I think, properly finding, that the transfer was not made, to the defendant's knowledge or intent, with intent to defeat or delay creditors; and unless there was knowledge of insolvency, the intent to obtain a preference over other creditors was wanting.

It cannot be contended for a moment that there was actual fraud, as there was in *Brooks v. Taylor*, 26 C. P. 443, and *Golloghy v. Graham*, 22 C. P. 226. The defendant agreed to give, and actually paid the full value of the goods, retaining the amount of his own debt. A considerable part of the price seems to have been applied in payment of the other creditors. The jury have negatived the existence of any fraudulent intent, and I think we are not called upon to reverse the judgment of a competent Court refusing to disturb their verdict.

I think the appeal should be dismissed, with costs.

HAGARTY, C. J., O., and BURTON, J. A., concurred.

*Appeal dismissed, with costs.*

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## COOK ET AL. V. PATTERSON.

*Conflicting evidence—Finding of Judge at trial—Reference of matters proper to be tried by Judge.*

Where the evidence is contradictory the Court will not interfere with the findings of the Judge who tried the case.

The plaintiff sued for alleged breach of a contract to sell and deliver a quantity of hay to be inspected. The plaintiff gave evidence of shortage and defective quality, and asked for a reference as to damages ; but the learned Judge who tried the case refused the reference, and gave judgment for the defendant.

*Held*, that the matters in question were proper for trial by a Judge, and that the plaintiff was not entitled to give *primâ facie* evidence of a breach of contract and then have a reference as to damages.

THIS action was commenced in the Chancery Division, but afterwards, by order of 16th September, 1882, transferred to the Common Pleas Division, and was instituted for the recovery from the defendant of \$2,600, for the non-delivery of 200 tons of hay agreed to be delivered by him to the plaintiffs.

It was tried by Osler, J., without a jury, at the Cobourg Autumn Assizes, of that year ; and, on the 3rd of February, following, judgment was given dismissing the action and counter-claim, with costs.

From so much of that judgment, as ordered, the plaintiffs' claim to be dismissed, with costs, the plaintiffs appealed to this Court, and the appeal came on to be heard on the 11th of September, 1884.\*

There was no written judgment of the Court below, but the learned Judge's findings are stated in full in the present judgment.

*Bethune*, Q.C., and *Smart* (of Cobourg), for the appellants.

*Hector Cameron*, Q.C., and *H. J Scott*, Q.C., for the respondent.

The questions upon which the present judgment turns are stated in the judgment.

\**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, JJ.A., and ROSE, J.

October 20, 1884. The judgment of the Court was delivered by

HAGARTY, C. J. O.—This was a case tried before my Brother Osler, without a jury, at Cobourg, occupying two or three days, and with a large mass of evidence adduced.

The statement of claim set out an agreement, dated 15th April, 1881, by which the defendant was to sell to the plaintiffs 2,270 tons of hay at a certain price, which the plaintiffs have fully paid: that defendant was to deliver the hay on board the vessels, to supervise and attend to the shipping thereof, and that if any of the hay was musty it was to be rejected and to be excluded from the 2,270 tons.

That in breach of that agreement the defendant delivered only 2,070 or 200 tons short, and of these 230 were musty hay and that plaintiffs are entitled to damages therefor.

Then (No. 4) a claim as to freight on railroads. This was abandoned on the argument.

5. That portions of the hay were stored at Port Hope and plaintiffs to obtain delivery were obliged to pay \$250.45 for storage, which they now seek to recover. All these charges were denied by defendant.

To prove the charge as to the mustiness, the plaintiffs had to rely on evidence to be obtained from New York, the market to which the hay was sent.

They proposed, as it appears by the short-hand notes, to have the details of the case referred to the Master, and to give such evidence only as would enable the Court to put a construction on the agreement between the parties.

We do not find in the appeal book any consent or ruling or order of the learned Judge, as to any reference. But we find a great mass of evidence going fully into the whole merits of the case as to shortage, mustiness, &c. All the various shipments at Port Hope, Oshawa, &c., are minutely investigated by witnesses. At the close of the case, nothing appears to have passed as to a reference, and judgment was reserved.

A number of letters from consignees in New York

and account sales, ranging in date from 24th May into August, appear in the appeal book as plaintiffs' exhibits.

Some of the earlier letters from New York were said to have been read by plaintiffs' agent to defendant. No proof was offered to verify their statements.

Our learned Brother who tried the case informs us that he wholly refused to order a reference on such matters, and announced that he would try the case in the ordinary way

He afterwards indorsed his findings on the record.

1. I find that defendant has substantially performed the contract set forth in the first five paragraphs of the statement of claim, and the plaintiffs are not entitled to recover in respect of any of the breaches of the contract alleged therein.

2. I find that there was no such agreement as is stated in the sixth paragraph of the said statement of claim.

3. As to the defendant's counter-claim, I find that there was no such agreement as is stated in the eighth paragraph of the defence and counter-claim.

4. As to the residue of the counter-claim, I find that the defendant is not entitled to recover in respect of either of the claims mentioned in paragraphs nine and ten of said counter-claim.

5. I dismiss this action and counter-claim, with costs. The plaintiffs' costs in respect of the counter-claim, I fix at the sum of one hundred dollars, to be deducted from the defendant's cost of defence.

6. I direct judgment to be entered accordingly.

3rd February, 1883.

F. OSLER, J.

No other written judgment was delivered.

It is difficult to understand how except by some express consent or arrangement, a reference of such matters as these could have been proposed or ordered. It was not a matter of account or to settle details, or to fix some unascertained amount for which the defendants were declared to be liable. It was matter essential to the foundation of the claim to prove the mustiness of the hay, for which large damages were claimed, and of which proof had to be given, to ground plaintiffs' right to recover. Defendant would



have had the right of fully examining and testing such proof and then to call his evidence to answer it. To refer such a matter to the Master would be simply transferring the actual trial of the case to him from the Judge.

Mr. Bethune, in the argument before us, admitted that without such reference or a new trial he could not maintain the claim for mustiness, and that if the facts stated in the letters did not entitle the plaintiffs to recover, he could not ask a reference.

We have examined this evidence. Even had the matters stated in those letters been in evidence, and a jury had on the whole case found as the learned Judge found (with an exception hereafter mentioned), we do not see how we could properly interfere.

The defendant gave very full evidence, supported by a large number of witnesses, as to the state of the hay when shipped at the different ports, of the course taken by the plaintiffs' agent in re-opening and re-weighing a large number of bales, of the great delay which occurred in the shipping of the hay, wholly caused by plaintiffs' own default, and the probable effects of heat, and a large amount of shrinkage consequent on the delay, and on the heat of the weather down to August, in which month the last shipments were made. It is plain that the plaintiffs were put in full legal control of the hay, under the agreement, as early as the commencement of May, if not in the last week in April, and if the plaintiffs so pleased they could at once have shipped the whole quantity. We are not prepared to hold that defendant was wrong in deposing that about the 29th of April the plaintiffs' agent, in consequence of his strong desire to hold the hay over against a falling in New York, did tell defendant that he would take all further responsibility in dealing with it on himself, and from that time regulated the shipping as he pleased.

The defendant was bound to deliver free on board, and plaintiffs say they had to pay some \$250 storage charges finally to get the hay from the warehouse in Port Hope. After 1st May, we think the plaintiffs are themselves bound to pay the storage. But the two first items in the

storage account up to May, amounting together to \$88.80, should, we think, have been charged to defendant. Apart from this amount we do not see our way to interfering.

A long and expensive trial has taken place. About thirty witnesses have been examined, collected from various points, and unless we find something clearly wrong in the result, we certainly ought not to interfere further. In so holding, we are willing to consider the statements in the letters. Even with this aid it appears to us that we cannot say the finding is not well warranted by the evidence.

The learned Judge appears to have overlooked the storage items. He should have allowed the \$88 to plaintiff. But on a judgment to that amount they would only have been entitled to Division Court costs.

We direct the judgment to be entered for the plaintiffs for \$88.80 on the claim for storage as money paid with Division Court costs; only one witness seems to have been called to shew this payment, and he was examined on other points of the case. The judgment in other respects to stand.

No costs of appeal are given on either side.

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## GARRETT V. ROBERTS.

*Common informer—Infant—Incapacity to sue.*

*Held*, that the 18 Eliz. ch. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this Province, and therefore the plaintiff, an infant, suing by his next friend could not maintain an action for a penalty under the Election Act.

The appellant having omitted to take this objection in the Court below, this Court on allowing the appeal on that ground, refused him his costs of appeal.

A person who sues for a penalty given by the Election Act is a common informer.

APPEAL by the defendant from the County Court of the United Counties of Northumberland and Durham.

The facts giving rise to the appeal are fully stated in the judgment.

The appeal came on to be heard before this Court on the 14th October, 1884.\*

*Hector Cameron*, Q. C., and *R. W. Wilson*, for the appellant. The evidence does not establish the fact that the voter, Skinner had a right to vote without taking the oath as suggested by the agents of the candidate and required by the defendant. Besides the County Court had not jurisdiction to entertain the action, and in any event the plaintiff being an infant, cannot be a plaintiff in this form of action.

*Riddell*, for the respondent. Skinner, it was shewn, had clearly a right to vote, and the conduct of the defendant was in direct violation of the Ontario Election law, and being so rendered the defendant liable to be sued in the manner provided for by the statute.

*Medcalfe v. Widdifield*, 12 C. P. 411, shews that the Court here appealed from had jurisdiction to entertain this action, and the objection of plaintiff's infancy now raised, is taken for the first time on the appeal. This being an action for debt, the plaintiff though an infant may sue.

The other cases cited are mentioned in the judgment.

\**Present*.—HAGARTY, C.J.O., PATTERSON and OSLER, JJ.A.

October 20, 1884. OSLER, J. A., delivered the judgment of the Court.

The plaintiff, an infant within the age of 21 years, by Henry John Snelgrove his next friend, sues in an action of debt to recover from the defendant who was a deputy returning officer at a recent election for a member of the Legislative Assembly of the Province of Ontario, the penalty of \$200 imposed by sec. 180, of the Election Act, upon any deputy returning officer who refuses or neglects to perform any of the obligations or formalities required of him by that Act. The particular offence or breach of duty alleged is, that the defendant refused to permit one Skinner, a voter, to take the form of oath which he was entitled and had offered to take, and required him to take instead thereof, or in addition thereto one which he was unable or unwilling to take, in consequence of which he was refused a ballot by the defendant, and did not vote.

The action was commenced by writ issued the 5th of March, 1883, and was tried without a jury, at the following June sittings of the Court. At the trial the plaintiff moved for judgment on the findings of fact. This motion was argued on the 20th July, and the decision thereon reserved until the 4th September, when the learned Judge gave judgment for the plaintiff, being of opinion that the defendant had refused to perform an obligation required of him by the Election Act.

So far as the appeal book shews the present appeal is from that judgment.

The grounds of appeal chiefly relied on were (1) that the plaintiff being an infant, could not sue for the penalty ; and (2) that the defendant was not liable for it unless there was a wilful intention on his part to neglect or refuse to perform the formality or obligation imposed on him ; in other words that mere neglect or refusal unaccompanied by a guilty mind would not make him amenable to the penalty.

We are all of opinion that the first objection is well taken, and it therefore becomes unnecessary to decide any



of the other questions argued before us, which appear to have received very careful consideration in the Court below.

The objection was not raised at the trial, or on the motion for judgment, but we think it still open to the defendant on the appeal in arrest of judgment.

It arises upon the old Statute of 18 Eliz. ch. 5, made perpetual by 27 Eliz. ch. 10, intituled "An Act to redress disorders in common informers," the first section of which enacts: "That every informer upon any general statute shall exhibit his writ in proper person, and pursue the same only by himself or his attorney in Court, and (that) none shall be admitted or received to sue against any person or persons upon any penal statute, but by way of information or original action, and not otherwise, nor shall have ne use any deputy or deputies at all."

In England this Act has been to some extent repealed by various statutes of the present reign; 11 & 12 Vict. ch. 43, sec. 36 repeals *inter alia*, "so much of the 18 Eliz. ch. 5, as relates to the exhibiting an *information* and pursuing the same in person and not by any deputy or deputies." The 8th section which had become obsolete is repealed by the Statute Law Revision Act of 1863, 26 and 27 Vict. ch. 125, and the 42 and 43 Vict. ch. 59, sched., would seem to have repealed the 4th section, which relates to the punishment of an informer misbehaving himself in the prosecution of his suit.

There is, however, no reason to think that the Act is not in force in this Province, and in *Bleeker v. Meyers*, 6 U. C. R. 134, it was held to be so in a case arising under the 4th section. Sir John Robinson there said: "We are of opinion that it is a decisive objection to our granting any relief that this appears to be a case in which the plaintiff is claiming costs, agreed as he says to be paid him in consideration of his doing what is expressly forbidden by Act of Parliament, 18 Eliz. ch. 5, this is, compromising a *qui tam* action without leave of the Court": *Hart v. Meyers*, 7 U. C. R. 416, is to the same effect.

The only legislation on our own statute books relating to informers is the 27-28 Vict. ch. 36: An Act to compel Informers suing for Penalties in certain cases to give Security for Costs.

As regards the effect of the first section of the statute upon the right of an infant to sue as an informer, there is not much to be found in the books, but it is uniformly laid down that he cannot do so.

*Buller's Nisi Prius*, 7th ed., p. 196*b* (1817): "By section 1 of that statute (the 18 Eliz. ch. 5) the common informer must sue in person or by attorney. Therefore an infant cannot be a common informer, for he must sue by guardian." For this *Maggs v. Ellis*, M. T. 25 Geo. II., is cited.

In *Stephens Law of Nisi Prius*, p. 2059. vol. 3, Tit. Infant: Personal incapacity; we find "An infant cannot be a common informer, because he can only sue by guardian, and the Statute of 18 Eliz. ch. 5, requires an informer to sue either in proper person or by attorney."

So also *Selwyn's Nisi Prius*, 12th ed., 1859, p. 236; *Sellon's Practice*, 1798, vol. 2, p. 65: "If an infant is plaintiff, the writ may be sued out in his name, but he must declare by *prochein amy* or next friend. It is for this reason he cannot be a plaintiff in a *qui tam* action because the statute 18 Eliz. ch. 5, requires such suit to be exhibited in proper person or by attorney."

*Tidd's Practice*, 1824, vol. 1. p. 95; *Lush's Practice*, p. 230; *Archbold's Practice*, 12th ed., 1866, p. 1240, state in general terms that an infant cannot sue as an informer upon a penal statute for this reason.

An anonymous case in *Sayer's Reports*, p. 51, (1752) may be noticed, in which judgment was arrested in an action *qui tam*, it appearing that the plaintiff was an infant, and was therefore disabled by the Act from maintaining such an action.

The law is stated in the same way in *Macpherson on Infants*, 1st ed., 1842, p. 356.

In *Simpson on Infants*, 1st ed. (1875), 101, it is said that an infant could not formerly be an informer, under 18 Eliz.

ch. 5, as such informer was bound to appear by himself or his attorney in Court, but now it seems he may by deputy. There is a reference to the 11 & 12 Vict. ch. 43, *supra*. It is not quite clear, however, that this Act extends to anything but the proceeding by way of information. See also *Tyler on Infancy*, 2nd ed., 1882, p. 192.

We have therefore not only the two decisions I have mentioned, but also what Lord Coleridge, in *The Guardians of St. Leonard's v. Franklin*, 3 C. P. D. 378, (which decides that a corporation cannot be a common informer,) calls "the general dictum of the text books," against the right of an infant to sue as such. I think we cannot do otherwise than hold this to be the law, a result I arrive at without regret, inasmuch as I regard it as highly objectionable to put forward a lad who has no interest in the election law to sue as a common informer for the penalties imposed for its breach.

Mr. Riddell argued that the rule applied only to a proceeding by way of information, and was not applicable to an action of debt, which this is. He further contended that the plaintiff was not a common informer as he was not suing *qui tam*, but for his own profit and advantage.

As to this (1) the Act of Eliz. is general in its terms, "Every informer shall exhibit his suit, &c."; and, "none shall be admitted, &c., but by way of information or original action." The original action appropriate to a penalty given by statute to a common informer and enabling him generally to sue for the same, was and is still the action of debt, the only difference being, that it is now commenced by writ of summons instead of by original writ. Com. Dig. Action. Debt E. 1, 2; Bl. Com. Book 3, 272-3. [Kerr's Ed. vol. 3, p. 278-9.]

(2.) The penalty is given by the 182nd section to any person who will sue for the same.

Where the penalty is not given to a party grieved, that is a party injured by the act to which the penalty is annexed, but is recoverable partly for the Crown and partly for the benefit of the person injured, or wholly for

the latter, he who sues for it is a common informer. "Usually the forfeitures created by statute are given at large to any common informer, or in other words to any such person or persons as will sue for the same, and hence such actions are called popular actions because they are given to the people in general. Sometimes one part is given to the Crown and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action because it is brought by a person *qui tam pro Domina Regina quam pro seipso in hac parte sequitur*." Bl. Com. Book 3, p. 162; Book 2, p. 437; *Kerr's* ed., vol. 3, p. 169, vol. 2, p. 447; *Wharton's Law Lexicon*, Informer, p. 479. See also *Robinson v. Curry*, 6 Q. B. D. 21, 7 Q. B. D. 465, where the distinctions are pointed out between actions which may be brought on penal statutes by parties grieved; "the informer suing *qui tam*, or for his own profit or benefit," and those given to a special class of persons who are neither parties grieved nor common informers: *Dyer v. Best*, L. R. 1 Ex. 152; *Mason v. Mossop*, 29 U. C. R. 500; *Bradlaugh v. Clarke*, 8 App. Cas. 354.

We think, therefore, that the appeal should be allowed, but without costs, as the objection we give effect to might have been taken at the trial, or even at an earlier stage of the cause; and the action dismissed, with costs.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred.

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## BEEMER V. OLIVER.

*Fraudulent conveyance—Assignee in insolvency, sale by—Receipt of dividend in insolvency proceedings—Sale by sheriff.*

F. being about to indorse notes for the accommodation of B., conveyed his real estate to O., who then conveyed to the wife of F. Afterwards F. became an insolvent under the insolvent act of 1875, and the assignee took proceedings to impeach the transaction, the result of which was, that it was declared fraudulent and void as against the assignee, who thereupon advertised the property for sale, and sold it as part of the estate of F. to the defendants.

Pending these proceedings the plaintiff had obtained execution on a judgment against F.'s wife, on promissory notes made by her and F., under which the sheriff, after the sale by the assignee, sold all her right, title and interest in the same property to the plaintiff. The plaintiff proved his claim on the notes and received a dividend in the insolvency proceedings against F.

*Held*, (1) that he was not estopped by the receipt of the dividend nor by the decree obtained in the suit of the assignee (to which he had not been made a party) from asserting that the property belonged to F.'s wife and was exigible under his execution against her: but (2), that the conveyance to her being in fact shewn to be fraudulent and void against the assignee in insolvency, the plaintiff had acquired no title by the sheriff's sale to himself under the execution, and that the title of the defendants who were in possession under the assignee could not be impeached by the plaintiff.

*Miller v Hamlin*, 2 O. R. 103, as to the effect of the receipt of a dividend, distinguished.

THIS was an appeal by the plaintiff from a judgment of Proudfoot, J., reported 3 O. R. 523.

The action came on for trial at Brantford, in the Autumn of 1882, when James Ostrander was called and examined as a witness on behalf of the defendant, and gave evidence as follows:

Q. You knew James Lewis Foster? A. Yes. I was somewhat acquainted with him. \* \* Q. You knew also Frances Isabella Foster, his wife? A. Yes, was somewhat acquainted with her—not so much. Q. You are the Ostrander mentioned in this deed? A. That is my signature: deed dated 9th March, 1878. \* \* Q. What were you asked to do in regard to this deed? A. As near as I can remember, he was asked to back some notes; the party was in a little trouble, and he wanted me to take the deed and give it back to his wife—I think it was given the same day. Q. Do you remember the man's name? A. Bannerman. Q. And he got into some trouble, and he wanted to give this property to you, and you were to give it to his wife? A. Yes. Q. Then he did give the property to you? A. Yes, it was signed over to me that way. Q. And then you did the same day sign it over to her? A. Yes, not two hours afterwards. Q. Any consideration pass? A. No. Q. Nothing whatever? A. No. Q. You paid nothing and she paid nothing? A. No, I was a kind of friendly.

Cross-examined: Q. Do you know on what day these deeds were actually executed? A. I couldn't tell you; I can't remember; it is so long ago, and I took no notice of it at all. Q. Have you any recollection of all that Foster told you that day about the thing? A. No particular recollection. \* \* Q. What did he say? A. As near as I can remember he said he was going to back some notes for somebody, and he wanted to make this safe for his wife. Q. Was that all that was said? A. That was all that I can remember. \* \* Q. Can you repeat it now? A. No. Q. You didn't remember who the person was? A. No. \* \* Q. Who drew the conveyances, do you know? A. C. F. Clarke, I think. Q. Where does he live? A. He is a lawyer in Tilsonburg. Q. Then there may have been money pass between the husband and wife, of course, that you didn't know anything about, or there may have been transactions that you knew nothing about? A. I don't know anything about that. Q. All that you know is that you didn't pay any money, nor did his wife pay anything to you? A. No. Q. You never thought of it an hour afterwards? A. No.

Charles F. Clark, solicitor was also examined. He swore that he had prepared the deeds in question from Foster to Ostrander, and from Ostrander to the wife of Foster, and that though dated respectively on the 2nd of January and 9th of March, 1878, they were executed on the thirteenth of the following month: that there was no searching of title, no bargaining, and that no money changed hands on the occasion of the execution of either of the deeds.

The other facts are stated in the report of the case in the Court below.

The appeal came on to be heard before this Court on 14th February, 1884.\*

*Moss*, Q.C., and *Fitch*, for the appellants. There is no ground for contending that the appellant should be estopped from questioning the validity of the sale by the assignee of the lands in question by accepting a dividend out of the insolvent estate. The assignee did not alter his position by reason thereof, nor was the estate prejudiced in any way by the appellant's conduct.

The assignee only assumed to sell the interest of the insolvent in the lands in question, and the respondents, the purchasers at the sale, had no remedy against the assignee by reason of any defect in the assignee's title. It is distinctly shewn that the respondents purchased the

\* *Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

lands in question with full notice and knowledge of the appellant's rights, and without notice that the appellant had accepted any dividend from the insolvent estate; they cannot therefore insist on such acceptance as a defence in this action.

It is shewn that the assignee had assets in addition to those derived from the sale of the lands in question properly divisible among the creditors of the insolvent; and the appellant, in accepting the dividend in question, had no notice that it was a final dividend, or included any part of the moneys derived from such sale.

But, however, that may be, the sale by the assignee to the respondents of the lands in question was, and is invalid: first, because there was no estate in the assignee, and the interest therein (if any) of the insolvent or his assignee was not saleable under the provisions of the Insolvent Act; second, because the requirements of the Insolvent Act were not complied with by the assignee in effecting such sale.

*Cassels*, Q.C., and *Hegler*, for the respondents. The authorities referred to in the judgment of the learned Judge who tried the case, and the decision in *Miller v. Hamlin*, 2 O. R. 103, shew conclusively that the plaintiff having received a portion of the proceeds of the sale of the premises in question must be estopped from attacking the sale and conveyance under which the respondents claim.

Here all the creditors, including the appellant, assented to the proceedings taken by the assignee to recover back the premises in question from Mrs. Foster, which proceedings were based on the deed to her being void. Having instructed the taking of such proceedings, and having received the benefit thereof by the receipt of the purchase money, and thus adopted such proceedings and sale, they cannot now repudiate the same, and claim that the deed which they asked to be declared void, and which was so declared—and under which declaration the premises were sold, and the proceeds of the sale received and distributed among them—is valid, and is to be treated as such, and a sale to one of the creditors based thereon sustained.

Nothing it is contended passed to the plaintiff under the sheriff's sale. At the time of such sale, by a decree of the Court, it had been declared that the conveyance under which the judgment debtor claimed the land was void, and there was therefore no interest in her in the premises in question, and the appellant consequently acquired no interest under that sale. If the decree so pronounced is not binding upon the appellant, still he is bound in this case, as before his purchase at the sheriff's sale he was notified of the proceedings, and the evidence given at the trial of this cause establishes the facts which proved the impeached conveyances were fraudulent and void, and on this ground nothing passed to the appellant under that sale.

*Black v. Fountain*, 23 Gr. 174; *Fleury v. Pringle*, 26 Gr. 67; *Jack v. Greig*, 27 Gr. 6; *Bank of Rochester v. Stonehouse et al.*, 27 Gr. 327, were referred to.

June 30th, 1884. OSLER, J. A.—The plaintiff claims title by a sheriff's sale and conveyance to him dated 28th August, 1880, under writs of *fi. fa.* against lands, issued on judgments recovered by himself against Frances Isabella Foster.

The defendants claim under a deed dated 13th March, 1879, from the assignee in insolvency of James Lewis Foster her husband.

The material facts may be briefly stated.

In July, 1878, plaintiff recovered two judgments in the usual form against Frances Isabella Foster, on promissory notes made by her and her husband, on which in the same month writs of *fi. fa.* lands also in the usual form were delivered to the sheriff.

The separate estate of the defendant consisted of the lands in question in the present action, which had been conveyed by her husband to one Ostrander for the purpose of being transferred, and which in March, 1878, had been transferred by him to her.

In June, 1878, James L. Foster became an insolvent under the Insolvent Act of 1875, and on the 11th July one Nairn was appointed assignee of the estate. Some



time after the plaintiff's writs had been delivered to the sheriff he filed a bill against Mrs. Foster and Ostrander to set aside these conveyances as being fraudulent and void against him as such assignee. The bill was taken *pro confesso* against the defendants, and on the 20th November, 1878, a decree was made in accordance with the prayer of the bill, and vesting the lands in the assignee. No notice was taken of the plaintiff's executions, and he was not made a party to the suit.

The assignee offered the property for sale by auction on the 21st February, 1879, and again on the 6th March, and the defendant, W. Oliver, became the purchaser for \$205, subject to a mortgage made by Frances Isabella Foster and James Lewis Foster, to the Southern Counties Building Society for \$375.

On both occasions the plaintiff gave notice of his claim under his executions and forbade the sale. It did not appear that the sale had been sanctioned at any meeting of creditors, but the assignee swore that it had been advertised in accordance with written instructions from the inspector, (not produced,) nor was it shewn that the inspector had sanctioned in writing a price below which the property was not to be sold.

The conveyance made by the assignee in pursuance of the sale bears date the 13th March, 1879, and purports to convey all the right, title, and interest of the insolvent and of the assignee to the purchaser.

On winding up the estate the assignee declared a dividend of 14 cents on the dollar, which was paid to the plaintiff and other creditors who had proved claims.

In August, 1880, the sheriff sold to the plaintiff under his executions all the right, title, and interest of Frances Isabella Foster in the lands in question.

The learned Judge did not specifically find upon the title of either party as set forth on the pleadings, but held that the plaintiff was estopped from impeaching the defendant's title under the deed from the assignee for the reason to be presently mentioned.

The plaintiff makes out a *primâ facie* title under the sheriff's sale, for there is nothing in the defendant's objection that the judgment and execution, being in the form usual in actions against persons *sui juris*, are apt proceedings to attach upon and convey the separate estate of a married woman. In support of the objection the cases of *Field v. McArthur*, 27 C. P. 15, and *Lawson v. Laidlaw*, 3 A. R. 77, 81, were cited, in which it is suggested that the judgment should be in the form of a decree charging the specific separate estate. That may be necessary where the property is held by trustees, and it is perhaps in any case, under the existing law, the more appropriate form. But where the property is held by the married woman in her own name there is no reason why it may not be reached in the ordinary way. There is no absolute rule of law or practice to the contrary. The proceedings are not void, and if she does not object to them no one else can.

A short extract from the judgment will shew the precise ground on which the learned Judge disposed of the case at the trial. He says :

“The conduct of the plaintiff in this case in accepting a dividend out of the proceeds of the sale of the lands was calculated to lead, by fair inference from his conduct, to the belief that he acquiesced in the sale, and the assignee was induced to do what he otherwise would have abstained from doing, viz., to declare and pay a larger dividend than the estate would have justified without the proceeds of that sale. The case is thus brought within the very terms of the judgment in *Cairncoss v. Lorimer*. Nor is it any objection that the assignee is not a party to the present action. The defendant is the purchaser from the assignee, and entitled to avail himself of any defence the assignee would have had.”

The principles of the law of estoppel by conduct are thus summarized by James, L. J., in *Ex parte Adamson In re Collie*, 8 Ch. D., p. 807-817: “Nobody ought to be estopped from avowing the truth or asserting a just demand unless by his acts or words or neglect his now averring the

truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something by reason of what he had said or done, or had omitted to say or do." And in *Carr v. The London and North-Western R. W. Co.*, L. R. 10 C. P. 307-317 Brett, J., laid down several "recognized propositions of an estoppel *in pais*," of which the only one relevant to the present inquiry is the third: "If a man, whatever his real meaning may be, so conduct himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented."

The question turns entirely upon the effect to be attributed to the acceptance of the dividend.

The plaintiff does not contest the learned Judge's view, of the law but he denies its application to the facts proved.

I agree that the receipt of a dividend under an assignment which is void or voidable for any reason against creditors, will estop the creditors who accept it from contesting the validity of the assignment, and that creditors who accept either from a grantor or grantee the consideration for a conveyance fraudulent against creditors may thereby establish the deed and give it validity. In such cases there is manifestly that sort of acquiescence on the part of those whose right it was to attack or object to the deed which makes it unjust for them afterwards to defeat it. They cannot take a benefit under it, and at the same time assert that it is invalid. They can only receive the benefit upon the implied condition that the instrument is to be taken as valid, for until they received it it was in the power of those who might be affected by their subsequent action to give or to withhold it. So here, if the plaintiff had set the assignee in motion, or had acquiesced in his proceedings, he could never afterwards have been allowed to assert that the land was not really Foster's but

his wife's, or to enforce his claim against her out of it. The action of the assignee and of the defendant would then have been directly traceable to, and influenced by, him.

That was the case of *Miller v. Hamlin*, 2 O. R. 103. There an insolvent had obtained his discharge, and had acquired, as he contended, a title by length of possession to certain land belonging to the estate as against the assignee. Having bought up most of his creditors' claims he took proceedings to compel the assignee to wind up the estate. Under the order of the Court made on his petition the assignee sold the land in question. The insolvent attended the sale, bid upon the land, and gave notice of his title to it. It was sold to the plaintiff, and the insolvent subsequently received the greater portion of the purchase money in dividends upon the claims. It was held that he must be taken to have procured the action of the assignee, and could not be allowed to repudiate the sale, or to dispute the title which had passed to the purchaser.

So in *Doe dem. Harley v. McManus*, 1 U. C. R. 141, it was held that a person against whose lands a writ of *fi. fa.* was issued, under which the lands were seized and sold, could not contest the validity of the sale, where it appeared that it had taken place at his instance or with his assent, and that he had received the benefit of the proceeds of the sale.

The present case appears to me to be widely different from those just referred to, and not related in principle to any of those cited in the judgment under review.

In *Cairncross v. Lorimer*, 3 Macq. 827 ; 7 Jur. N. S. 149, a congregation of Seceders had united themselves to the Free Kirk of Scotland, and in pursuance of the vote a minister had been solemnly inducted without any objection or dissent on the part of a small minority of four persons who had complete knowledge of all the proceedings. It was held in an action brought by them to have property which had passed by the amalgamation, restored, that they were precluded by their own conduct from maintaining it.



There the plaintiffs had an interest to prevent an act from being done, but made no objection to it, and allowed others to change their position to their prejudice, on the faith of the plaintiffs' acquiescence in it.

In *Ex parte Cutten re Ruspini*, 1 Gl. & J. 317, an action of trover by a bankrupt against his assignees was restrained where the bankrupt had presented a petition for a *supersedeas*, then abandoned it, passed his last examination, joined in a conveyance of part of his property, and solicited and obtained the requisite signatures to his certificate. The Court said there had been not merely delay and passive acquiescence; there had been active co-operation on the part of the bankrupt in the administration of his estate, which amounted to a pledge to his assignees that he would not attempt to disturb the commission. His conduct had been calculated to induce the assignees to prosecute the commission in security.

*Clarke v. Clarke*, 6 Esp. 61, was a similar action, and the plaintiff failed for somewhat similar reasons.

In these and the like cases there has been conduct on the part of the person asserting the demand, which directly induced what is complained of, or acquiescence in it while it was being done.

In the case before us on the contrary it is plain that the action of the assignee was not authorized by the plaintiff or in any way or at any time assented to or approved of by him, and that both he and the defendant had distinct notice at the time of the sale and subsequent conveyance to the latter that the plaintiff meant to enforce his judgment and execution against the land as property of Mrs. Foster. Therefore nothing that the plaintiff said or did, or omitted to say or do induced the assignee or the defendant to change his position in selling or buying, paying the purchase money or executing the deed.

Then where is the evidence of subsequent conduct indicating acquiescence in the sale? The declaration and payment of the dividend, a dividend which was paid out of the whole of the estate, were the acts solely of the

assignee uninduced by any conduct or representation of the plaintiff and with full knowledge of his contention.

The notice of the dividend would merely inform the plaintiff that a dividend sheet had been prepared subject to objection: he would not know whether it was a first or final dividend, or its amount, so that his silence at that stage could neither indicate acquiescence nor mislead the assignee; or prevent other creditors from objecting to his dividend. If, indeed, the dividend sheet as thus prepared, and the subsequent payment had been the result of an assertion by the plaintiff of a right to share with other creditors in this particular asset, I should be inclined to think that he would be estopped, as that would seem to be a conclusive adoption of and acquiescence in the proceedings of the assignee as having been taken on behalf of all the creditors. In the absence of any evidence of that kind it appears to me that the declaration and payment of the dividend must be taken to have been merely the voluntary official acts of the assignee done with full knowledge of his own position and of the plaintiff's claim. I think, with the greatest respect for my Brother Proudfoot, that in such a case there is no estoppel: *Bigelow* on Estoppel 3rd Ed., pp. 575, 576.

I proceed, therefore, to consider the effect upon the plaintiff's title of the decree already referred to.

This decree in effect declared that Mrs. Foster had no interest in the land, and vested it in the assignee as part of the estate of the insolvent. But, inasmuch as the plaintiff was not a party to the action in which it was obtained, I am clearly of opinion that he was not bound by it. He had, it is true, no estate in the land, but his writ gave him a lien upon any beneficial estate or interest which his judgment debtor had therein.

A decree obtained behind his back in an action to which he was not a party, could not avail to defeat his claim, or prevent him from asserting it at the proper time. Mr. Cassels urged that in the absence of fraud such a decree was binding, even as against third parties, but, as was held

in *Gifford v. Hort*, 1 Sch. & L. 386, a decree obtained without making parties those whose rights are affected thereby is fraudulent and void as to those parties, and a purchaser under it, with notice of the defect, is not protected by it. The case of *The Merchants' Bank v. Morrison*, 19 Gr. 1, lays down and enforces the same rule. And see *Best* on Evidence, Am. Ed., vol. 2, p. 1003.

As between the parties to the suit the decree had its full operation, and the assignee took the land subject only to any lien created by the plaintiff's writ.

The question here, therefore, (the plaintiff who merely bought in the land under his own writ, not being in the position of a purchaser for value without notice : *Swaze v. Burke*, 12 Peters 1,) comes to be just that which would have arisen in the former suit if the plaintiff had been a party to it, namely, whether as against Foster's assignee in insolvency and those claiming under him the conveyance to Mrs. Foster was fraudulent and void.

That is the question which would have been tried if the plaintiff instead of selling under his writ in the first instance had brought his action, as he should have done, to get rid of the conveyance from the assignee to the defendant, and to have the property sold under the decree of the Court : *Wilson v. Shier*, 6 Gr. 630 ; *Malloch v. Plunkett*, 9 Gr. 556 ; *Ib.*, 11 Gr. 439 ; *Kerr v. Bain*, 11 Gr. 423 ; *Chalmers v. Pigott*, 11 Gr. 475.

On the evidence it is plain that the property was conveyed by Foster to Ostrander merely for the purpose of being transferred to his, Foster's, wife. Although one deed bears date the 2nd January, and the other the 8th March, 1878, they were parts of the same transaction, and were actually prepared and executed on the 13th April, 1878. The expressed consideration in one is \$1,000, and in the other \$1,100, but no consideration actually passed. Ostrander speaking of his part in the transaction gave the following evidence :

"Q. What were you asked to do in regard to this deed?  
A. As near as I can remember I was asked to back some notes. The party was in a little trouble, and he wanted, me to take the deed and give it back to his wife." "Q. Do you remember the man's name? A. Bannerman."

The evidence here and in other parts of the appeal book is very badly reported, or was given in a confused inaccurate manner, for it appears further on that it was Foster who was to be a party to the notes referred to.

The witness continued: "Q. And he got into some trouble and he wanted to give this property to you and you were to give it to his wife? A. Yes." "Q. Then he did give the property to you? A. Yes, it was signed over to me in that way." "Q. And then you did the same day sign it over to her? A. Yes, not two hours afterwards." "Q. Any consideration? A. No." "Q. You paid nothing, and she paid nothing? A. No; I was a kind of friendly."

In cross-examination. "As near as I can remember he said he was going to back notes for somebody, and he wanted to make this safe for his wife?"

The solicitor who drew up the deeds said that Foster and his wife came to his office. Foster gave instructions, and the name of the grantee was left blank. "He (Foster) was going to see a party, and when he came back he gave me the name as Ostrander." He said Foster left the country shortly after the conveyances were executed, and subsequently the wife came to see him being in trouble about some creditors who were suing. There was conversation about this property, the substance of what she said was that the signing or conveying the property in this way was her husband going to Manitoba, and it would be the means of enabling her to sell and dispose of it without having his signature, or something of that kind. I understood from her that he had indorsed pretty heavy for Bannerman, and that it was this difficulty which was now pressing him.

In cross-examination. "Q. What were you talking about? A. This was when she came to me on an occasion for the purpose of seeing me. She was so pressed with



threatening letters, and she expected to be closed up, and she then made a remark with reference to those conveyances. Q. What did she say about them. That it would be handier for her to convey? A. Yes, there was a letter from him with reference to if I could possibly get a purchaser; that is the letter I alluded to I can't find."

I am of opinion that the proper inference to be drawn from the evidence is, that the deeds in question were made for the purpose only of defeating and delaying the husband's creditors, and that they were therefore fraudulent and void as against the assignee. I have not overlooked Mr. Moss's contention that the land was conveyed to the wife in pursuance of an agreement made with her by her husband in the previous September (1877), when the latter was selling a farm in Walsingham to one Brown. It was said that the wife refused to execute the deed unless her husband would convey to her the land now in question as a consideration for barring her dower, and that he agreed to do so. One Daniel Ellis gave evidence from which it might be inferred that something of this kind did occur, but I do not think it establishes a clear and settled agreement to which the Court could give effect when opposed to testimony which leads so strongly to a different conclusion as to the effect of the deed. Ellis's own impression of what passed between the parties is rather opposed to the idea that there was any deliberate agreement. He says: "I told her I thought he would be as good as his word, and make the deed when he got home. I thought it would be as much for him as anybody;—a little outside conversation that did not amount to anything."

But even if there was an agreement, it would not avail to support the deed, as Mrs. Foster had already barred her dower in a mortgage on the Walsingham farm, and her husband was selling merely the equity of redemption, "the alienation of which would defeat the wife's dower, because in that case the husband would not die seized." Esten, V. C., *Smith v. Smith*, 3 Gr. 451; *In re Robertson*, 25 Gr. 276, 486.

As, therefore, she was not a necessary party to the

deed of the Walsingham farm, having no estate or interest, inchoate or otherwise therein which her husband could not defeat by such deed, the conveyance of the lands now in question was purely voluntary and without consideration, and void under the statute as against his creditors actual and prospective: *Black v. Fountain*, 23 Gr. 174; *Fleury v. Pringle*, 26 Gr. 67.

In *Beavis v. McGuire*, 7 A. R. 704, a conveyance to the wife's trustee was upheld on the ground that the wife had barred her dower in a mortgage of the legal estate and in subsequent mortgages, and on the sale of the equity of redemption under an agreement made by her husband on the first occasion and reiterated on the sale of the equity of redemption, to convey other land to a trustee for her.

That case does not, nor does the case of *Forrest v. Laycock*, 18 Gr. 611 assist the plaintiff to maintain the transaction in question.

The statute 42 Vict. ch. 22, secs. 1 and 2, has no application as the mortgage in which the wife barred her dower was made before it was passed: *Martindale v. Clarkson*, 6 A. R. 1.

The result is, that the plaintiff appears to have acquired no title by the sale under his writ.

It seems unnecessary to consider the question as to the title of the defendant (who is in possession) under the deed from the assignee. But I do not think it has been successfully impeached.

The decree is therefore affirmed, and the appeal dismissed, with costs.

BURTON and PATTERSON, JJ. A., concurred.

SPRAGGE, C.J.O., died in the month of May preceding.

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## DUNLOP V. DUNLOP ET AL.

*Conveyance obtained by undue influence—Rectification—Rescission.*

In an action to restrain waste it was shewn that the plaintiff obtained from his father a deed of the premises in question, the father swearing that he supposed when executing the document that it was his will he was making, and the conveyancer who prepared the deed admitted in his evidence that he might have suggested to the subscribing witness to the deed not to talk too much to the old man about the writing, as perhaps he would not sign it; and the deed as prepared was silent altogether as to certain provisions and payments that were to be made as alleged by the plaintiff. The Court reversed the decree pronounced by the Court below, directing the deed to be reformed; and ordered the bill to be dismissed, with costs, and the deed to be delivered up to be cancelled.

THIS was an appeal by the defendants from the judgment of Boyd, C., reported 6 O. R. 141.

David Dunlop, the plaintiff, was the son of the defendant Thomas Dunlop, senior, and the brother of the defendant Thomas Dunlop, junior.

The statement of claim alleged that the plaintiff was the owner of the west half of lot No. 3, in the 8th concession of the township of North Monaghan, subject to the life estate of his father, and that the defendant Thomas Dunlop, junior, claiming some right or title through his father as tenant for life, had been and was committing waste by cutting timber on the said lands, to the damage of the plaintiff's reversion; and prayed an injunction and damages.

Thomas Dunlop, senior, was made a party defendant, at the instance of his co-defendant, by an order in Chambers.

The statement of defence alleged that up to the 6th day of August, 1878, the defendant Thomas Dunlop, senior, was the registered owner in fee simple of the lands in question, and that upon that day he executed an instrument intended to be in the nature of a will, but prepared in such a way as to take effect as an immediate conveyance to the plaintiff of the said lands and other property. It further alleged that the defendant Thomas Dunlop, senior, was about sixty-five years of age at the time of the execution of the

indenture: that his mental faculties had become greatly impaired: that he was very infirm in body, and almost destitute of hearing, and charged that the plaintiff possessing influence over him, and occupying a relation of confidence towards him, by fraud and deceit had the instrument prepared in the manner aforesaid by an unskilful person, and induced the defendant to execute it, the transaction being carried out by the defendant hurriedly and without independent advice, and the defendant receiving no value or consideration whatever for the conveyance; and it prayed that the instrument might be declared fraudulent and void, and be delivered up to be cancelled. As to the defendant Thomas Dunlop, junior, the statement of defence alleged that the lands had been conveyed to his wife by his father, by a deed subsequent to the one in the plaintiff's favour, and that he had cut timber thereon by her leave and license, and as the servant and agent of his father.

The instrument executed by the father in favour of the plaintiff is set out in full in the report below, 6 O. R. 141.

The action was tried at Peterborough on the 7th April, 1883, before the Chancellor, who, at the close of the evidence, intimated his opinion that a case of fraud had not been established, and recommended the parties to arrange a settlement.

No agreement having been arrived at between the parties, the case was argued on the 7th June, 1883, and judgment was delivered on the 20th June, 1883, declaring:

That upon the plaintiff paying to the defendant Thomas Dunlop, the elder, the arrears of the annuity at the rate of Forty-five dollars per annum, from the 6th day of August, A. D. 1878, and the arrears (if any) of maintenance (the said arrears of maintenance to be placed upon a money basis) the plaintiff is entitled to an assurance of the lands and premises in the pleadings mentioned upon the death of the said defendant Thomas Dunlop, the elder, and doth order and adjudge the same accordingly."

Thereupon the defendants appealed to this Court, and the appeal was heard on the 12th June, 1884.\*

\* *Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and MORRISON, J. J. A.



*G. T. Blackstock*, for the appellant. For all practical purposes this may be looked upon as an action of trespass, and in that view the plaintiff was bound to establish his title to the property in question ; or at least that his right was higher than that of the defendants, whose dealings with the estate he seeks to restrain. This the plaintiff has failed to shew. The plaintiff claimed under the indenture of the 6th of August, 1878, but that being expressed to be an immediate conveyance in fee, to take effect however at a future time, that is, after the death of the grantor, is void. Admitting, however, that such conveyance was good at law, the learned Judge below erred in holding that it had been obtained *bond fide*. The evidence shews beyond all doubt that the relations between the father and son were those of extreme confidence on the part of the former, who was advanced in years and feeble in health, and that the plaintiff had taken advantage of these circumstances to obtain this deed from his father. The reformation of the conveyance as directed by the judgment was not warranted by either the pleadings or the evidence. In fact the judgment has the effect of compelling the parties to enter into an agreement which neither ever contemplated. He cited *Mason v. Seney*, 11 Gr. 447 ; *Beeman v. Knapp*, 13 Gr. 398 ; *Dawson v. Dawson*, 12 Gr. 278 ; *McConnell v. McConnell*, 15 Gr. 20 ; *Johnston v. Johnston*, 17 Gr. 493 ; *Lavin v. Lavin*, 27 Gr. 567 ; *S. C.* 7 A. R. 197.

*Edwards*, for the respondent. As the deed to the plaintiff is attacked as having been obtained by fraud and undue influence, he is entitled to have the decision of this Court as to the validity of the deed, even if he is not entitled to succeed in his claim for damages ; but the acts of trespass having been clearly established he is entitled to damages unless the defendants are successful in their impeachment of the deed. The learned Chancellor, before whom the witnesses were examined, was clearly, of the opinion that the evidence entirely failed to sustain the charge of fraud and undue influence, and the Court fol-

lowing the rule so frequently enunciated, will hesitate to interfere with his finding: *Wycott v. Hartman*, 14 Gr. 219; *Armstrong v. Armstrong*, 14 Gr. 528; *Loffus v. Maw*, 3 Giff. 592; *Walsh v. Lonsdale*, 21 Ch. D. 9; *Seaton v. Lunney*, 27 Gr. 169; *Dodwell v. Gibbs*, 5 B. & C. 709.

June 16, 1884. HAGARTY, C. J. O.—It seems wholly unnecessary to enter into any discussion as to whether the wonderful piece of conveyancing, which has caused this suit, may or may not be capable of vesting any and what estate in the grantee, as we are all in accord with the Court of Chancery in holding that it does not carry out the true intent of the grantor, or of any bargain entered into between the parties, and was obtained under such circumstances as not to bind the grantor.

The difficulty in the case arises from the view expressed by the learned Chancellor, that the deed should be reformed to suit what he considers to have been the real contract between the parties. He thus states the claim and defence:

“The action is for waste, the plaintiff alleging that he is the owner of the land subject to the life estate therein of the defendant his father. The waste consists in felling some trees on the lands by another defendant, the brother of the plaintiff, who was put in motion by his co-defendant.

“The defence sets up that the deed on which the plaintiff relies was obtained by him from his father by means of fraud, deceit, and undue influence, and it asks that this deed may be cancelled as fraudulent and void.”

The learned Judge considered that no fraud or improper influence was made out, but that the whole difficulty arose from the blunders of the conveyancer, and that the real agreement was, that the father desired the plaintiff to remain with him on the place, and agreed if he did so the farm should be his at his father's death; the father to be the proprietor and have authority over the place for life, the plaintiff to work it and provide suitable maintenance

for the father, and pay him \$45 annually for life, and pay certain legacies. No mention was made in the deed of the yearly payments, no provision for the father's maintenance, and it is puzzling to ascertain what is the precise operation of this conveyance.

Thomson, subscribing witness to the deed, says that he heard something as to the old man getting his living off the place and, he thinks, \$40 odd for pocket money, but cannot say whether this was to be each year: that he asked Douglas, the conveyancer, what it was, who said it was an assignment or a deed, but that the old man thought it was a will, and David (the plaintiff) said not to say much about it to the old man, or he would not sign it.

After signing, the old man speaks of his right to sell or mortgage the place; witness told him nobody would give him a dollar on it; he said yes, he could change it as often as he liked.

Douglas says he got instructions from the old man, and he made a memorandum, which is lost: that the old man did not mention the word "will," only spoke of writings. He won't say whether he understood it or not: that plaintiff was to work the place, and have it at his father's death, and the father was to have his living. He thinks there was some amount that the father was to receive, but does not remember.

Then he is asked if after he signed he expressed the idea that he could still raise money on it, or mortgage or sell it? Answer, "I think so."

He is asked, "Did he, witness, think he could? A.—I thought he could not. I thought so from the drawing." Q.—"Did you tell him that was a mistake. A.—I don't remember whether I told him or not." Q.—"Well then he signed it under the belief he could mortgage or sell? A.—That was talked of afterwards." Q.—(After referring to what Thomson had said on this) He was depending on you, I suppose, to draw those papers right, he was not depending on Thomson? A.—I suppose not."

The witness always declined to contradict Thomson's statements when his attention was called to them.

The plaintiff's evidence is, that he was to work the place, have it at his father's death, and after that give \$100 to each of his sisters: that his father told him to get Douglas to draw writings: that he does not know what took place between them: that he was to support his father, but to pay nothing except a mortgage then on the place; no rent to be paid. He is told that Thomson has sworn, "you told him not to talk much about the writing to the old man, for perhaps he would not sign it. Do you remember that conversation? A.—I don't remember it. I may have probably said it, but I don't remember saying it."

The father was examined before the trial, not being able to attend.

He denied that he told his son to get writings drawn: that when Douglas came, he told him to give no authority to anyone as long as he lived.

He says plaintiff did not ask him to give him the property, he asked his father to rent it to him. He never asked for a deed: that he thought he was signing a will or something of that nature, and that he always thought so till about two years ago. If he had known it was a deed he would not have signed it, and that plaintiff never gave him anything for the place, or paid any rent: that he has since made a deed of half the lot to his daughter-in-law, and for that he has to get his support in part.

I think it abundantly clear that a deed so obtained cannot stand, and that it requires a larger charity than I possess to exempt the parties obtaining it from severe blame, for, as I think, knowingly obtaining the old man's signature to a document wholly contrary to his intentions and to any agreement he had entered into.

I think it should be set aside at the cost of the party seeking benefit under it.

As to reforming it, I am unable to see how that can be done. Apart from other considerations, it seems impossible to hold that there is any evidence that the contracting parties ever agreed on the payment of any fixed sum. The



plaintiff himself distinctly denies that he was to pay anything, except discharge a small mortgage.

The father says nothing about it. Douglas cannot remember anything of it, and it all depends on Thomson, who says something was said about paying \$40 or \$40 odd, but whether as one payment or annually he cannot remember.

Mr. Blackstock argued, with much force, that it would not be fair to the father to make him party to a deed with provisions in it as to which he has not been examined, the issues depending at the time of his examination not raising or suggesting the nature of such provisions.

But irrespective of this objection I think we have no reliable evidence on which it would be safe to frame any instrument which would fairly represent any agreement actually made between the parties.

To direct the framing and execution of a deed as proposed could hardly fall within the usual idea of rectifying or reforming a contract. The case before us is of an instrument drawn so that it fails altogether to carry out the terms of any proved bargain. It is incapable of being enforced against the grantor in consequence of a deception practised upon him, and the parties differ completely as to the terms on which any bargain between them was really made.

I think the plaintiff's bill should have been dismissed, with costs.

BURTON, PATTERSON, and MORRISON, JJ. A., concurred.

*Appeal allowed, with costs ; action in Court below dismissed, with costs.*

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## MIDLAND RAILWAY COMPANY V. ONTARIO ROLLING MILLS.

*Sale of goods—Contract to deliver same in portions—Rescission—Repudiation of contract.*

The defendants contracted to purchase a quantity of old iron rails from the plaintiff company, to be paid for as each 100 tons were delivered. The plaintiffs consigned 1150 tons out of 1300 tons stipulated for, and drew for the amount thereof at the agreed price, which draft the defendants refused to accept under the erroneous belief that a portion of the iron charged for had not been received by them, and informed the plaintiff company of the ground of their refusal to accept the draft.

*Held*, (affirming the judgment of the 2 Q. B. D., O. R. 1) that this refusal to accept was not, under the circumstances, such an act as to warrant the plaintiffs in treating it as a repudiation of the contract, or such as would release the plaintiffs from a further performance of it.

What would amount to such a repudiation considered.

THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, reported 2 O. R. 1, where the facts are fully stated, and came on to be heard before this Court on the 11th September, 1884.

*J. K. Kerr*, Q.C., for the appellants. The agreement, as shewn by the letters passing between the parties, was for a sale to the defendants of all such rails as the plaintiffs had to sell, by reason of the plaintiffs relaying or intending to relay their road, and the quantities which were stipulated for or rather mentioned in the correspondence were such merely as it was estimated or supposed the plaintiffs would have to dispose of.

There was not at any time an intention on the part of the plaintiffs to bind themselves to supply the quantities spoken of; and the plaintiffs did deliver, or at all events offered to consign to the defendants all the rails they had at their disposal. There was neither neglect nor refusal on the part of the plaintiffs to deliver to the defendants any of the rails sold or agreed to be sold to them; on the contrary, the plaintiffs did from time to time ship to the defendants all such rails as were required to be sent by the defendants.

Admitting, however, for the sake of argument, that the plaintiffs did not deliver the full quantity of rails, such non-delivery was caused by the refusal of the defendants to pay for such quantities as had already been delivered to them by the plaintiffs, by reason of which and the conduct generally of the defendants the plaintiffs became relieved and discharged from any further carrying out of their agreement.

*Osler*, Q.C., and *Laidlaw* for the respondents. The plaintiffs are shewn to have made default in the delivery of 150 tons, residue of the 1,300 tons agreed to be delivered by them under their contract, and they have thus rendered themselves liable to the defendants for damages by reason of such non-delivery. Admitting, as is suggested, that the plaintiffs were bound only to deliver such rails as they might have, their own letters furnish conclusive evidence that they had even more than the quantity called for by the contract, so that there was not any excuse for their not having fully carried out their agreement, other than their determination not to complete the contract. In any view of the matter, the letter of the defendants under date of 21st February, 1880, set forth in the case, could not, under the facts and circumstances, relieve the plaintiffs from delivering the remaining 150 tons of rails; for subsequent to that date it is shewn that both parties treated the contract as still subsisting.

The cases cited appear in the report of the case in the Court below and in the judgments.

September 27, 1884. BURTON, J. A.—The only point calling for serious consideration upon this appeal is that relating to the alleged renunciation or refusal to perform the contract, for there can be no doubt that the construction placed by my brother *Osler* upon the contract itself was the correct one.

The question, therefore, would seem to resolve itself into whether we can say that the Court below were wrong when they came to the conclusion upon the evidence in

this case, that the plaintiffs were not justified in treating the defendants' letter and conduct as a refusal to perform the contract, such as would amount to a rescission if they had power to rescind.

The true test in such cases is the one laid down by Lord Coleridge in *Freeth v. Burr*, L. R. 9 C. P. 208, fully approved of in the House of Lords in the recent case of the *Mersey Steel Co. v. Naylor*, L. R. 9 App. Cas. 434.

The question is, as explained by Lord Justice Bowen in that case in the Court of Appeal, 9 Q. B. D. 648, not whether the conduct of one party to the contract was inconsistent with the contract, but whether the conduct of one party to the contract was really inconsistent with an intention to be bound any longer by the contract.

That must necessarily be a question of fact upon the evidence in each particular case. The question is, whether the facts here justify the conclusion that the defendants had so conducted themselves as to leave it at the option of the other party to the contract to relieve himself from any further performance.

What is relied on for that purpose is, the defendants' letter of the 21st February, 1880, which declines acceptance of the plaintiffs' draft for reasons assigned, some of which turned out to be erroneous, but which the defendants believed at the time to be correct. But how can this be regarded as an absolute refusal to carry out the contract in the face of this further statement in the letter: "We think you should now deliver the balance due us on the contract before asking us to pay any more money. The time has so far gone by the date when we expected the whole amount that we think it not unreasonable to ask this."

The reasons assigned, if they had been true in fact, were perfectly satisfactory reasons for not accepting the draft, and for asking the company to deliver the residue of the iron without exacting any further payments. It was not a refusal to pay under any circumstances, but a refusal to accept under circumstances which they believed



to exist, and which, if they had existed, would have justified the refusal. If the plaintiffs had corrected the mistake into which the defendants had fallen there is no reason to suppose from what subsequently occurred that the latter would not have paid for the iron delivered. But the very terms of the letter shew that they still considered the contract in force, and indeed it was manifestly to their advantage that it should be considered in force, as the market was rising.

But it is clear also that the plaintiffs did not consider it as an attempt to rescind, for in their letter to the defendants of the 5th June following they intimate that they will soon be able to complete the delivery of the remainder of the old iron under this contract.

Under these circumstances it is not possible for us to say that the Court below have come to a wrong conclusion upon the evidence. I am, therefore, of opinion that the judgment below should be affirmed, and this appeal dismissed, with costs.

PATTERSON, J. A.—Several points of law have been argued upon this appeal, but they will not require much discussion, because the substantial matters for decision are really questions of fact.

As far as we have, in this Court, to deal with the dispute, it relates to the defendants' counter-claim for damages for non-delivery by the plaintiffs of part of the old iron, covered, as the defendants assert, by the contract.

The correspondence from which the terms of the contract are to be gathered was conducted, on the part of the defendants, by Mr. Gartshore, their agent, or Mr. Fuller, their general manager, and on the part of the plaintiffs by Mr. Cox, the managing director. It begins with a letter from Mr. Gartshore, who had seen, as he writes, by the newspapers, that the railway company proposed re-laying its track with steel rails, and proposing a negotiation for the purchase by the defendants of the old rails which, it occurred to him, the company would have to dispose of.

This was followed by an interview with Mr. Cox, after which Mr. Gartshore wrote again, offering \$14.10 per gross ton, "say 1,500 tons, delivered either to the Grand Trunk Railway, or free on board vessel at this port (Port Hope). Terms, cash. We could take delivery in such lots as would suit you, and pay for each as supplied." The date of this letter is 19th August, 1879. Later, on the same day, he wrote again, increasing the proposed price to \$15, and adding: "I would also like the option of taking a larger quantity at the same price, should you have such to dispose of this season. Delivery could begin at once if you see fit."

The \$15 not being closed with, Mr. Gartshore writes on 20th August, from Hamilton: "I saw Mr. Fuller this morning, and pressed his acceptance of your figure for the 1,500 tons rails at \$16 per gross ton, and at last got his consent; he telegraphs you this morning accepting the offer, and asking you to confirm it. I will arrange about the freight, and advise you by telegraph how to ship."

On 26th August Mr. Fuller writes to Mr. Cox that he is negotiating with vessels to bring the old rails to Hamilton, and closes his letter by saying: "Please forward formal acceptance of the proposition made for us by Gartshore;" and Mr. Cox, on the following day, writes thus:

"DEAR SIR,—I have your favour of yesterday. We are laying down our new rails and taking up the old ones as rapidly as possible, but it would be some days before we could get enough at Port Hope to load a vessel. I am sorry you have not been able to arrange for carrying them by rail, it would have been much more convenient to us to have sent them back on the same cars that took out the new rails, and they could have gone forward gradually in that way, and would, I think, have been on the whole cheaper for you. By the time you pay wharfage, harbour dues, and transferring from cars to the vessel at Port Hope and the same at Hamilton, I fancy you will find the railway carriage cheaper and much more convenient. I have instructed Mr. Tate to send you drawing for fish-plate, and you will, no doubt, have it by this or following mail. I now formally accept your offer of \$16 per gross ton for from 1,300 to 1,500 tons of old iron rails, F. O. B. cars at Port Hope. Cash on delivery of each 100 tons, or with the privilege of drawing against them as may be agreed upon between us as they are shipped."

This is the last of the correspondence on the subject of the contract. We could not say from it alone that a completed contract was shewn.

As was pointed out to us, on the argument, by Mr. Kerr, the terms here said to be accepted were not the same as the terms offered. They varied in two particulars. One was in the price, that offer being \$16 on the cars or free on board a vessel, and the so-called acceptance saying only "free on board cars." The other and the more material one was with reference to the quantity.

At this stage it cannot be doubted that in place of a contract being completed, the negotiation was still at large. The defendants were not bound to agree to the variations; but the matter had assumed the form of a proposal on the part of the plaintiffs on the new basis, which the defendants were at liberty to accept or reject. Their acceptance is evidenced by several subsequent letters, not accepting in formal terms, but in equally distinct effect. One letter expressly notices the variation in the "F. O. B. cars," and by that and the other letters Mr. Fuller discusses how to adjust the expenses of one or other mode of carriage.

Nothing now turns on the question of price; but, in construing the contract as to quantity, the variation from the original proposal seems to me a material consideration.

Had the original proposal been accepted, we should have had a contract by which the defendants agreed to buy the old iron rails taken up for the purpose of being replaced by steel rails, "*say 1,500 tons.*" That would have been the form of the contract if the effect of the earlier letters had been extended in the shape of a formal note; and it would have been difficult, if not impossible, to distinguish it from contracts such as those construed in the cases to which Mr. Kerr referred us, of *Leeming v. Smith*, 16 Q. B. 275; *Gwillim v. Danvill*, 2 C. M. & R. 61; *Gill v. Morrison*, 26 C. P. 124, and *McConnell v. Murphy*, L. R. 5 P. C. 203. It would most probably have been held that the named quantity was only an estimate, not entering into the contract as one of its terms, or at all events not fixing a minimum quantity which the defendants could insist upon.

But, in the new offer made by Mr. Cox, on 27th August, the indefinite nature of the reference to the quantity is changed to a definite prescription of the limits between which the deliveries were to range. "I now formally accept your offer of \$16 per gross ton *for from 1,300 to 1,500 tons of old iron rails.*"

This makes the contract very different from those in question in the cases referred to, and one susceptible in my judgment only of the construction given to it by my Brother Osler, who tried the action, as fixing, for the protection of the plaintiffs, 1300 tons as a quantity beyond which they were not to be bound to deliver, while it did not bind the defendants to accept more than 1500 tons.

But, after all, this question of construction is not a material one, because it is found as a fact that there were old iron rails enough applicable to the contract as originally contemplated to complete the delivery of at least 1300 tons. That finding has not been effectively questioned, and under the evidence could not be so. As late as June, 1880, Mr. Cox refers to the matter in writing to Mr. Fuller, and the whole of his correspondence, to say nothing of the oral evidence, supports the finding.

The defendants, then, being originally entitled to 1300 tons, and having received only 1150, the remaining question is whether they can insist that the plaintiffs are in default by the nondelivery of the other 150 tons.

This is the principal contest on the present appeal, a majority of the Divisional Court having decided against the plaintiffs, the Chief Justice dissenting from that opinion and agreeing with the view taken at the trial.

The last shipments of rails, completing the quantity of 1,150 tons and 1,730 pounds, were made on the 13th and 14th February, 1880.

The books of the plaintiffs shewed a balance due by the defendants, after charging all the rails shipped, of \$1,502.72, and the plaintiffs drew for \$1,500. That draft was not accepted; the refusal being explained by Mr. Fuller in a letter dated 21st February, 1880, to the secretary of the plaintiff company, which reads thus:



"DEAR SIR.—Your draft for \$1,500 00 has been presented and for several reasons acceptance declined: 1st. Our books show about one thousand dollars due you. Two cars, Nos. 281 and 207, shipped Jan. 23rd, have not been received by us. If they had been you have drawn for considerably more than would be coming to your company; 2nd. We think you should now deliver the balance due us on contract before asking us to pay any more money. The time has so far gone by the date when we expected the whole amount that we think it not unreasonable to ask this."

There is no evidence of any formal reply to this letter. A correspondence commenced in March respecting another proposed sale of 2500 tons of old rails, with which we are only concerned at present so far as it formed part of the evidence that the failure to deliver the 150 tons was not because the material fell short. This correspondence ran on till late in June. It is only necessary to refer to one of the letters, viz., that of 5th June, because it alludes to the old contract and it is the only one that does so. Mr. Cox writes on that day to Mr. Fuller: "We shall now soon be able to complete the delivery of old rails under the first contract, and commence delivery of the 2500 tons. You will kindly let me know whether you desire them shipped by water or rail."

No further rails were shipped. There was a dispute about the new contract; and as to the old one, we have the following note of part of Mr. Cox's evidence: "Wrote defendants 5th June. They did not answer, and they did not pay our drafts. That is the true reason why rails not delivered."

The plaintiffs drew a second time for the balance of their account, but the defendants again declined to accept. The following is their letter:

"Ontario Rolling Mills Co.,

"Hamilton, Aug. 20th, 1880.

"MR. H. REED, Secy.

"Midland Railway, Port Hope, Ont.

"DEAR SIR.—Your draft for \$1502.72 has just been presented, and acceptance declined for same reason stated in our letter to you of Feb'y 21st, a copy of which we enclose herewith.

"We have only now to add that the two cars have never been received, nor the quantity of iron contracted for.

"We also enclose statement of the account as our books show it.

"Yours respectfully,

ONTARIO ROLLING MILLS CO."

The subsequent correspondence in evidence consists only of three letters from the defendants to the plaintiffs' solicitors. One is dated 16th September, and is unimportant, the second is, of 30th September, and states the discovery that the rails shipped on 23rd January, 1880, by one of the cars supposed to be missing had been received on 30th January, the defendants' error having been occasioned by the rails having been transferred *en route* to a car of a different number from that mentioned in the notice of the shipment; and the third letter, written as late as the 24th January 1884, in reply to one from the solicitors, informs them that both car loads had been received on the 31st January, 1880, and were now credited to the plaintiffs. The price of these two car loads was nearly \$340, which tends to explain the discrepancy between the plaintiffs' books, which shewed the balance for which they drew, and those of the defendants', where the item was not credited until the cars had been traced.

One other fact, which must not be overlooked, is, that old iron rails had very considerably risen in value after the contract was made, and it was therefore the interest of the defendants to receive the full contract quantity.

The question is, whether the refusal to pay for the rails delivered, or anything else disclosed by the correspondence, justified the plaintiffs in refusing or neglecting to deliver the remaining 150 tons of the 1,300 tons contracted for.

The solution of this question depends on inferences of fact.

The rule of law is, stated by Lord Coleridge in his judgment in *Freeth v. Burr*, L. R. 9 C. P. 208: "In cases of this sort," he said, "when the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse the performance of the contract." This statement of the law has been expressly adopted as correct by the Court of Appeal, in *Mersey*

*Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648, and by the House of Lords in the same case, 9 App. Cas. 434, while both of those appellate Courts differed from Lord Coleridge, before whom the action had been tried, in the application of the rule to the facts.

In the case before us the same rule was recognized by the learned Judge at the trial, and the question is, what is the proper inference to be drawn from the facts? Did the defendants intimate an intention to abandon and altogether refuse performance of their part of the contract?

I agree with the majority of the Court below, that no such intimation is conveyed by the letters refusing acceptance of the drafts. The first reason given in the letter of 21st February, that the draft was for \$500 too much, chiefly because the shipment advised as of 23rd January had not been received, certainly conveyed no such intimation. The defendants' mistake as to the facts does not alter the effect of the letter, understanding as we do that the mistake was an honest one. The second reason is more open to argument, put as it is in the letter, if we read it critically, as a reason for declining. It certainly is susceptible of being read as expressly saying: "We will not accept, because you ought, under the circumstances, to deliver the balance before asking us to pay any more money."

That, however, would not, in my judgment, be a fair construction to put upon what was really said. It seems more properly to be regarded as a request than as insisting on new terms. "We think it not unreasonable to ask this." It is only something added to what was in itself a sufficient reason, not for refusing to pay for goods which they understood to have been received, for that they were not asked to do, but for declining to accept a draft for what they believed to be an excessive amount.

The defendants' letter of the 20th August, declining acceptance the second time, adds to the reasons previously given that the quantity of iron contracted for had not been received, which is a pretty express disclaimer of any idea

that the contract was abandoned. It may have been an insufficient reason for not paying for what had been delivered, but that is a different thing, as is forcibly pointed out by Lord Selborne, in the *Mersey Steel and Iron Co.'s Case*, in the House of Lords; and besides, it was still only a refusal to accept a draft for what the plaintiffs knew was considered by the defendants too large an amount, a mistake which, so far as shewn to us, the plaintiffs had not taken pains to correct. But it is clear that the plaintiffs never understood the letters, or the refusal, to convey such an intimation as we are now asked to infer. They never supposed that the defendants intended, or meant it to be understood that they intended, to abandon a contract which the rising market made it so much to their advantage to insist on.

Upon this point I do not feel from reading the judgments delivered in the Court below, that the learned Chief Justice formed any decided opinion contrary to that entertained by the other members of the Court. He says he thinks the plaintiffs might reasonably have assumed that the defendants did not require any more, and again, that treating the matter as one of fact, and as a juror, he finds that the plaintiffs might have concluded from the defendants' conduct that the latter treated the contract for further delivery as at an end, and that they refused further performance of it: that he should certainly have so found as a juror; and that he therefore agrees with the learned Judge at the trial.

Now, while I do not take quite the same view of the action of the defendants as fairly susceptible of being treated by the plaintiffs as intimating their recession from the contract, I cannot find from the evidence that they did so regard or treat it; and while his lordship, entertaining the opinion that the defendants' action was susceptible of that construction, gave proper effect to that opinion by refusing to interfere with the finding of the Judge of first instance, I do not gather that he came to any decided conclusion in his own mind that the plaintiffs understood or construed



the defendants' letters as they now ask us to do. His lordship alludes to the difficulty in the plaintiffs' way created by the letter of 5th June, and for my own part, the more I consider that letter the more certain it appears, that the man who wrote it did not understand that the contract he then spoke of soon being able to complete, had been off since February.

We are indebted to the learned Judge who tried the action for his very careful and able judgment, which leaves no uncertainty as to the grounds of his decision. He fully recognized, as I have already said, the principle on which we are now proceeding, but he thought the case was not distinguishable from *Withers v. Reynolds*, 2 B. & Ad. 882, in which the contract was held by the Court to be a contract to pay on delivery for each load of straw delivered by the defendant, and it was also held that an intimation by the plaintiff that he would not pay on delivery, but would always keep the price of one load on hand, freed the defendant from the obligation to go on delivering.

The agreement had been to deliver three loads of straw every fortnight up to a certain date, and the plaintiff was to pay so much a load. The plaintiff's refusal to hold himself bound to pay on delivery was met by the prompt refusal of the defendant to further perform his part of the contract.

We have now the advantage of the exposition of the law in *Mersey Steel and Iron Co. v. Naylor*, 9 App. Cas. 434, which had not been argued in appeal when this action was tried, and was not heard in the House of Lords till over two years after the trial. While that case merely affirms the principle already settled by decisions, and recognized at the trial of this action, that the question of the abandonment of the contract is one of fact, the instructive judgments delivered make it more clear that the fact is to be decided on the whole evidence, and not necessarily on our construction of a particular act or expression.

In *Withers v. Reynolds* the facts were in a small compass. There was the intimation of intention to retain the price of one load till the delivery of the next, and the understanding of that act, and prompt notification of that understanding to the plaintiff, as such a departure on his part from the contract as to release the defendant from his part of it.

A decision of a question of fact in one case can rarely be taken as an authority for deciding a similar question even when the evidence may seem to be similar. But we have here evidence of a very different character from that in *Withers v. Reynolds*, 2 B. & Ad. 882.

There is the long silence of the plaintiffs after the receipt of the letter of 21st February, which is capable of being held to imply that the plaintiffs did not understand what was said as being anything more than a request or suggestion that no more money should be looked for till all the iron was delivered, and that they assented to it. This effect of the silence on this topic is emphasized by the fact that an active correspondence was maintained about another matter. The point is, that the plaintiffs by their conduct have furnished convincing evidence against their present contention, that they received the letter of 21st February as an intimation that the defendants intended to depart from the contract.

Then the silence is broken by the letter of the 5th of June, amounting to an affirmative assertion that they had no such understanding.

I think the judgment of Mr. Justice Cameron puts the case upon its proper footing, and that we should dismiss the appeal.

GALT, J.—After careful consideration, I am of opinion that the construction put upon the defendants' letter of February 21st, 1880, by Mr. Justice Cameron is correct. The letter is as follows: "Your draft \* \* We think you should now deliver the balance due us on contract before asking us to pay any more money. The time has

so far gone by the date when we expected the whole amount, that we think it not unreasonable to ask this." I can attach no other meaning to this expression than a request that the plaintiffs would forego their right to demand payment as each quantity of 100 tons was delivered, and not an absolute refusal to be bound by the terms of the original contract. It was not in the interest of the defendants to refuse to receive the iron, for the price had risen considerably. It is true that the defendants refused to pay the amount of the draft, but it was under the mistaken idea that the draft was for a sum considerably larger than it should have been ; this would certainly not amount to a repudiation of the contract. The case of *Mersey Steel and Iron Co. v. Naylor & Co.*, L. R. 9 App. Cas. 434, establishes that the mere fact of postponing payment under erroneous advice (in that case, but in this of non-delivery) "does not shew an intention to repudiate the contract so as to release the company from further performance." The ground very strongly urged by Mr. Kerr, that the plaintiffs had fulfilled their contract by delivering all the iron they had contracted to sell, cannot, in my opinion, prevail in face of the plaintiffs' letter of June 5th, 1880, in which they expressly admit the contract had not been concluded ; they say: "We shall now be able to *complete* the delivery of old rails under the first contract." It is manifest they were then under the impression the contract had not been completed, and there is no intimation that they considered it had been put an end to.

ROSE, J.—The rule laid down in *Freeth v. Burr*, L. R. 9 C. P. 208, is thus stated by Lord Coleridge, C. J., in *Mersey Steel and Iron Co. v. Naylor*, in his judgment of first instance. "The true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." This is approved of by the Court of Appeal, L. R. 9 Q. B. D. 648, and in the House of Lords, L. R. 9 App. Cas. 434.

The question is one of evidence.

The letters of the 21st February, 1880, 5th June, 1880, and 20th August, 1880, taken with the acts and conduct of the parties, afford the evidence in this case. The first letter is as follows. [His Lordship here read the letter as above set forth.]

It appears probable that the books of the defendants did shew only about \$1,000 due at that date, as the draft included two cars shipped on the 13th and 14th of February, but of which the defendants were not advised till the 28th of February, also the two cars referred to, which, by some confusion as to Nos. of cars, the defendants had lost track of, although at the time they probably had been received.

So far then as the defendants knew this objection was based on fact, and was to their minds a sufficiently ample and just ground of refusal to pay.

From it alone therefore it would not be fair to conclude that the defendants were absolutely refusing to pay what might then be due, but were merely refusing to pay what they considered was an over draft.

The second ground of refusal occasions more difficulty. If the fair meaning is, we decline to pay your draft for past account because there is a "balance (of iron) due us on contract," and decline to make payment for future deliveries as shipped, but only when the whole amount is shipped, it would be very difficult, it may be it would be impossible to distinguish the case from *Withers v. Reynolds*, 2 B. & Ad. 882.

If the plaintiffs had taken that meaning from it and come to the conclusion that the defendants intended "no longer to be bound by the contract," and had refused to make further deliveries in consequence of such evinced intention, their position would have been very strong.

They however did nothing, made no reply, until the 5th of June, following, when they wrote as follows :

Peterborough, June 5, 1880.

S. A. FULLER, Esq., Hamilton.

DEAR SIR,—We shall now soon be able to complete the delivery of old rails under the first contract, and commence delivery of the 2500 tons. Will you kindly let me know whether you desire them shipped by water or rail.

Yours truly, Geo. C. Cox.



It is evident that up to this time the plaintiffs thought the defendants were anxious for delivery, and that they were bound to deliver, and had, or shortly would have rails on hand which they could deliver.

It possibly never occurred to them that the defendants could have any intention to refuse acceptance of the iron or to do anything to prevent their enforcing such acceptance, for the market had risen and the receipt of the iron as per contract meant a handsome profit to the defendants.

It may be the plaintiffs, not knowing the facts as to the two missing cars any more fully than the defendants, were willing to withdraw the draft until that difficulty could be cleared up, and looked upon the balance of the letter as a request rather than a demand.

However that may be, is it unfair to the plaintiffs to treat their letter of June 5th either as evidence of an assent to the request or a compliance with the demand? In either view it would not be fair to say that the defendants, on the 5th of June had no right to delivery of the balance of the rails.

The learned Judge at the trial found that a reasonable time for delivery expired on the 1st of March, 1880. So that on the 5th of June, 1880, the defendants were entitled to delivery of the balance of rails and the plaintiffs had been in default some two months. This may account for the terms of their letter of the 5th of June.

Would not the defendants be acting reasonably in supposing after the receipt of that letter that the plaintiffs intended to deliver the balance without further payment, and were they not justified in awaiting the receipt of that balance?

It is said that at that date, if the accounts had been taken crediting the plaintiffs with the amount of their draft and debiting them with the difference between the market price and the contract price, the balance would be in the defendants' favour, or at least the account would be balanced.

If so would there be any equity in determining that the defendants were bound to pay the \$1,500 until they had received the balance?

Whether that be so or not it seems to me that on the 5th of June the defendants were not put in fault by any action of the plaintiffs, but on the contrary they had the right to expect full delivery before further demand of payment.

No change takes place until the 20th of August, 1880, when the defendants wrote a letter to the plaintiffs.

On that date, not having received from the plaintiffs the balance of the rails, could not the defendants have sued the plaintiffs for damages for non-delivery, and credited the plaintiffs with the balance due them for past deliveries or left them to counter-claim for such amount? Or could not the plaintiffs have sued the defendants for the balance due for rails delivered, and left the defendants to counter claim for damages for non-delivery of balance of rails? Had that not been the position of the parties ever since the 5th of June, the time for reasonable delivery having expired on the 1st of March? It has been urged that the letter of 5th June called for a reply, that it asked for shipping instructions as to balance.

I would not so read it. In the light of the facts as stated in the judgment, I would think it called for instructions merely as to the 2,500 tons. Even if it did, the plaintiffs were not then ready to deliver the balance, and if they ever became ready and willing to deliver, was it not their duty then to notify the defendants and ask for shipping instructions? They preserve a complete silence until the 20th of August, when they cause their draft to be presented to the defendants, without advice or excuse for not completing delivery, or taking the position that they were not bound to deliver.

On the 20th of August the defendants write:

"Your draft for \$1,502.72 has just been presented, and acceptance declined for same reason stated in our letter to you of February 21, a copy of which we enclose here-

with. We have only now to add that the two cars have never been received, nor the quantity of iron contracted for. We also enclose statement of the account as our books show it."

We have not as an exhibit the statement of account, so we cannot say if the books shewed only about \$1,000 due.

It appears the missing cars were not discovered until some weeks subsequently, so that the defendants at that time still thought they had good grounds for refusing the drafts as being for too much.

In view of the letter of 5th of June, the repetition of the demand or request about delivery of the balance before asking for payment seems natural, and the statement that "the quantity of iron contracted for" could not have been received does not present to my mind any evidence of any intention not to receive or pay for it, but rather a notice that the defendants complained of its non-delivery.

Shortly after the missing cars were discovered, whereupon without delay this action was commenced, without, so far as the appeal book reveals, the plaintiffs having at any time taken the position that they were not bound to deliver the balance of the rails, or notified the defendants that they would not deliver.

I may adopt the language of Lord Blackburn in the *Mersey and Naylor Case*, in the House of Lords, L. R. 9 App. Cas., p. 443, as singularly applicable to the facts in this case as I view them: "So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present, and if that statement had been an absolute refusal to pay, saying, 'Because we have the power to do wrong we will refuse to pay the money we ought to pay,' I will not say it might not have been evidence to go to the jury for them to say

whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of the kind here—it was a *bonâ fide* statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment, but as I said before, it prevents the case from coming within the authority of *Withers v. Reynolds* and *Freeth v. Burr*, L. R. 9 C. P. 208.”

It is manifest that the evidence is capable of leading different minds to opposite conclusions. The fact that so able and experienced Judges as the learned Judge of first instance, Mr. Justice Osler and the Chief Justice of Ontario, then presiding in the Queen’s Bench Division, take the same view of the facts and law, shews that it cannot be said that reasonable minds may not differ as to the conclusions to be drawn from the facts.

Had I been sitting in the Divisional Court I do not know that I should have had sufficient confidence in the view I have taken to have joined in reversing the finding of the Judge at the trial.

His finding, however, has been reversed, and I therefore give effect to the opinion I have formed, and concur in dismissing the appeal, with costs.

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## JENNINGS V. MOSS ET AL.

*Assignment for benefit of creditors.*

By a deed of assignment for the benefit of creditors the trust was declared to be "to sell and dispose of such portions of the said estate as shall be readily saleable either for cash or credit, or under the power hereinafter contained to carry on the said business. \* \* and to stand possessed of the said moneys, &c., and all profits and increase arising therefrom, in trust to pay," &c., and a subsequent part of the deed provided that the assignee "shall have power to employ the said party of the first part [the insolvent] or any other person in winding up the affairs of the said trust estate, in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade."

*Held*, [affirming the judgment of the County Court, HAGARTY, C. J. O., dissenting] that the provisions above set forth did not invalidate the deed.

## APPEAL from the County Court of Huron.

The facts, shortly stated, were that on the 29th of April, 1882, one McLeod, who then carried on business as a general dealer at the village of Gorrie, assigned to the plaintiff all his goods and chattels, (other than his household furniture), in trust to sell and dispose of such portion thereof as was readily saleable, either for cash or credit, or under the circumstances mentioned in the deed in that behalf to carry on such business; and also to collect with all necessary speed the outstanding debts and accounts, and after paying expenses to divide the residue amongst the creditors without preference.

The plaintiff took possession of the stock assigned, and afterwards the sheriff seized under an execution sued out by the defendants. An interpleader issue was thereupon directed which was tried before the Judge without a jury, when an objection was taken that the authority to carry on the business of itself rendered the deed void.

At the trial the Judge found all the facts in favour of the defendants.

The plaintiff subsequently applied to set aside the finding of the Judge and enter a verdict for the plaintiff which, after hearing counsel for both parties, his Honour directed to be done.

The defendants thereupon appealed to this Court, and the appeal came on to be heard on the 12th of September, 1884\*

*Gibbons*, for the appellants.

*Biggar*, for the respondent.

The provisions of the deed, the points relied on, and cases cited appear in the judgment.

October 20, 1884. HAGARTY, C. J. O.—The assignment does not in terms speak of furnishing new goods or merchandize, and in that respect differs from *Alexander v. Wavell*, *ante* p. 135.

The trust is, “to sell and dispose of such portions of the said estate as shall be readily saleable, either for cash or credit, or under the powers hereinafter contained in that behalf to carry on the said business; and also to collect with all convenient speed the outstanding debts and accounts, and to stand possessed of the said moneys and trust estate, *and all profits and increase arising therefrom*, in the first place to pay and discharge,” &c. Afterwards the assignee “shall have power to employ the said party of the first part, or any other person, in winding up the affairs of the said trust estate, in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade;” and to allow those so employed such sums, &c.

Then follows the clause that neither the assignee nor the executing creditors should be liable as partners, either of assignor or assignee, or of each other.

This provision would be utterly absurd and useless unless in the case of carrying on the business and the making of profits therefrom.

I am unable to hold that this deed did not contemplate the exercise of the alternative power given to the assignee to carry on the business, obtain fresh goods, and make profits, &c.

\* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

I do not think any creditor could be fairly expected or required to execute or accept such a deed ; and that it was void as against objecting creditors.

The other objections to the deed, I think, are not fatal.

BURTON, J. A.—I can add but little to what I have already said in *Alexander v. Wavell*, ante p. 135.

In the present case there is an express finding, that there was no fraudulent intent on the part of the debtor, but that the transaction was *bonâ fide*.

The sole question is, therefore, whether the deed is fraudulent in law in consequence of the provision enabling the assignee to carry on the trade.

The deed is badly drawn. The trusts are “to sell and dispose of such portion of the said estate as shall be readily saleable, either for cash or credit, or under the powers hereinafter contained in that behalf to carry on the said business.” The power thus referred to being contained in the following passage: “And it is hereby declared, expressed, and agreed that it shall and may be lawful, and the said party of the second part shall have power to employ the said party of the first part, or any other person, in winding up the affairs of the said trust estate, in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade ;” and further, “that the said party of the second part shall not be liable for any more moneys than he shall actually receive by virtue hereof, nor any loss or damage that may happen to the said estate, unless caused by his wilful default or neglect.”

The language of the trusts in this case is very similar to that employed in *Janes v. Whitbread*, 11 C. B. 406 ; and for the reasons there given, viz., that the deed contemplates the sale of the property, and the winding up of the business, and the power given to the trustee to carry on the trade was evidently intended to be merely subsidiary to the winding up of the concern, we should not hold this deed invalid.

Mr. Gibbons attempted to draw a distinction, which has no solid foundation, between a case like the present and *Cox v. Hickman*, 3 C. B. N. S. 523, a point not taken in the reasons of appeal nor apparently argued in the Court below, viz: that in that case the business remained the property of the debtor, whereas here the property is, transferred to the trustee for the creditors and the debtor is constituted their agent to carry on the business. There is in truth, no such distinction. The property itself in *Cox v. Hickman*, 3 C. B. N. S. 523, was transferred to the trustees with power to them to carry on the business, and to dispose of any portion not required for the purpose, and to pay and divide the net income of the business among the creditors ratably, and it was argued that as they were interested in the property they would be partners; but it was held that the mere concurrence of the creditors in an arrangement under which they permit their debtor, or a trustee for the debtor, to continue his trade, applying the profits in discharge of their demands, did not make them partners with the debtor or their trustee. The debtor was still the person solely interested in the profits, save only that he had mortgaged them to his creditors. The trade was not carried on by or on behalf of the creditors. The debtor or the trustee was the person by or on behalf of whom it was carried on.

The test of liability is not merely whether there is a participation of profits, but whether there is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business.

The debtor and the trustee were no more the agents of the creditors in this case than in *Cox v. Hickman*, 3 C. B. N. S. 523.

The debtor here as there is the person still interested in the profits, although he has precluded himself from applying them to any other purpose than the discharge of his debts.



I refer thus fully to it for the purpose of shewing that there is no room for the distinction pressed upon us on the argument. But the cases are very different in this respect. In the one case it was contemplated that the business should be carried on for years, and the main source upon which the creditors relied for payment of their debts was the future profits. Here it was intended that the power to carry on the business should be merely ancillary to the principal trust, that of winding up the business and distributing the proceeds among the creditors. We have dealt with that question in *Alexander v. Wavell*, ante p. 135.

I think the judgment of the learned Judge in the Court below was right, and should be affirmed, and the appeal dismissed, with costs.

OSLER, J. A.—The *bona fides* of the deed cannot be impugned, and the only question before us is, whether in its terms, taken by themselves or in connection with the surrounding circumstances, there is anything which constrains us to hold it void.

In the recent case of *Badenach v. Slater* decided in the Supreme Court on an appeal from this Court, and of which a partial report, omitting the judgment of the Chief Justice, appears in vol. 20 C. L. J. p. 306, Mr. Justice Strong treats the well known case of *Pickstock v. Lyster*, 3 M. & S. 374, as being still the governing authority in support of assignments for the benefit of creditors generally. That case decided that such an assignment, though it may have the effect of hindering and delaying a particular creditor of his execution, is not within the spirit of the Act of 13 Eliz., and therefore not void, because it does not deprive any creditor of his fair share of the debtor's property, if he chooses to become a party to the deed.

In *Badenach v. Slater* supra, Strong, J., says: "As soon as it is once admitted that a particular creditor may lawfully be hindered and delayed by an assignment for the whole body of creditors, it necessarily follows that every reasonable and useful power for the protection of

the whole body of creditors must also be valid. I am of opinion that this is the law under 13 Eliz., and that we need not seek the aid of the Provincial statute to enable us to reach such a decision." And Gwynne, J., says: "The clause at the end of the 2nd sec. of ch. 118, R. S. O. (22 Vic. ch. 96) appears to me to have the effect of giving statutory recognition to a doctrine already well established by the decisions of the Courts, viz.: that a deed of assignment made by a debtor for the purpose of paying and satisfying ratably and proportionately, and without preference or priority all the creditors of such debtor their just debts, shall not be construed to be a deed made either to defeat or delay the creditors of such debtor, or to give one of such creditors a preference over another, unless there be something on the face of the deed which *ex necessitate rei* has the effect of raising a presumption *juris et de jure* that the intention of the debtor was to defeat or delay creditors in the sense in which such an act is prohibited by the statute."

This decision accords with the case of *Metcalf v. Keefer*, 8 Gr. 392, 394, in which it was held that the provincial statute had made no alteration in the law except to avoid preferential assignments, and that if the assignment was not preferential it could not be deemed void on any ground on which it would not have been so considered previously to the passing of the statute. See also *Gallagher v. Glass*, 32 C. P. 641; *Tuer v. Harrison*, 14 C. P. 449; *Gottwalls v. Mulholland*, 15 C. P. 62, 67, in App., 3 E. & A. 194; *Ontario Bank v. Lamont*, 6 O. R. 147.

This construction of the Act has prevailed so long, and is supported by so much authority, that we ought not, as I respectfully think, to overturn it. It was not disapproved of in this Court in *Gottwalls v. Mulholland*, 3 E. & A. 194, and I think its approval is involved in the decision of the Supreme Court in *Badenach v. Slater*.

The deed now in question, not being void as a preferential assignment, we find that the test for determining

whether its terms and conditions are such as to take it out of the general rule which upholds it, was laid down in *Owen v. Body*, 5 A. & E., 28, which decides, as Maule, J., points out in *Janes v. Whitbread*, 11 C. B. 406, that the insertion of an unreasonable stipulation in the deed, that is, a stipulation which it was not reasonable to expect a creditor willing to take a fair share of his debtor's property to accede to, renders it invalid ; in other words, it is then, within the letter and spirit of the Act, a deed made with intent to delay and hinder creditors. See also *Bank of Toronto v. Eccles*, 2 E. & A. 62, 66.

The objections to this deed have now to be considered. They are thus stated in the reasons of appeal :

“ The deed of assignment relied upon by the plaintiff is bad, in that it provided that the trustee may sell and dispose of such portion of the said estate as shall be readily saleable, either for cash or credit, or under the powers hereinafter contained in that behalf to carry on the said business.” And because the said deed further empowers the said trustee “ to employ the said party of the first part, or any other person, in winding up the affairs of the said trust estate, in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade ;” and further, “ that the said party of the second part shall not be liable for any more moneys than he shall actually receive by virtue hereof, nor any loss or damage that may happen to the said estate, unless caused by his wilful default or neglect.”

On the argument, the objections to the clauses for the exoneration of the trustee and enabling him to sell for cash or upon credit, were not pressed ; but the further objections were for the first time taken that creditors were required to become parties to the deed, and that the effect of its provisions was to make them partners in the event of the debtor's trade being carried on for any purpose.

I consider that the first of these new objections, viz., that creditors are required to become parties to the deed, is disposed of by the reasoning in *Metcalf v. Keefer*, 8 Gr. 392, 395, and *Feehan v. Lee*, 10 C. P. 385, 390.

If the other clauses in the deed are innocent, the creditor cannot be prejudiced by becoming a party to or signing it, and if he refuses to do so and is delayed, it is by his own act, not by the deed. Burns, J., would seem to have been of a different opinion in *Burritt v. Robertson*, 18 U. C. R. 555, but in that case the deed contained a release of the debtor. *Feehan v. Lee*, *supra*, is an express decision, and I think a satisfactory one. See also *Clapham v. Atkinson*, 4 B. & S. 730, 737.

Then as to employing the assignor in winding up the estate. This is merely permissive. The assignee is not bound to employ him, and if he does so, is not bound to pay him any sum fixed by the deed. He must employ and, of course, pay some one, and the assignor may for many reasons be the most suitable person. There is no extrinsic evidence that the power is an improper one in the circumstances, and by itself it is not illegal.

In *Cornwall v. Gault*, 23 U. C. R. 46, such a power taken in connection with other conditions in the deed supported an inference of fraud, and everything there shewed that the deed was a mere device to delay creditors. The clause is a very usual, and I think not an unreasonable one. In *Metcalf v. Keefer*, 8 Gr. 392, and *Feehan v. Lee*, 10 C. P. 385, deeds which contained it were upheld. See also note to *Janes v. Whitbread*, 11 C. B. 418, Am. ed.

Then, do the provisions of the deed make the creditors executing it partners in the business to whatever extent the latter may be carried on? If they do, I need inquire no further; the deed would clearly be unreasonable, and one that no creditor should be required to execute: *Owen v. Body*, 5 Ad. & Ell., 28 has never been doubted on that point.

But I am of opinion that Mr. Gibbons has not successfully distinguished this case from *Hickman v. Cox*, H. L. 9 C. B. N. S. 47, 8 H. L. C. 268. It is the debtor who authorizes the trustee to carry on the business, and it is his business which is so carried on, not that of the creditors, who merely signify their concurrence in the powers conferred



by the deed. True, they derive the benefit of the profits and increase of the business, but they do so as being part of the estate of the debtor which has been transferred to the trustee. The creditors and trustee do not stand to each other in the relation of principal and agent, and that is the test.

I may refer to what is said by Blackburn, J., in *Bullen v. Sharp*, L. R. 1 C. P. Ex. Ch. 86, 112: "The true question is as stated by Lord Cranworth, (in *Hickman v. Cox*,) whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profit as to constitute the relation of *principal and agent* between the person taking the profits and those actually carrying on the business."

The remaining objection is, that which relates to the carrying on of the assignor's business.

No one can read the deed without seeing that this direction merely relates to winding-up the estate, and enabling the trustee to dispose of it to the best advantage. The deed is loosely drawn, but that is what it means, and not, as was contended, that the trustee has a discretion to carry on the debtor's trade as a continued business for as long as he chooses to do so, looking to the profits as the principal fund for the payment of the debts.

The case of *Janes v. Whitbread*, 11 C. B. 406, 414, is an express authority against the objection, and I think we are not warranted in disregarding it merely because of the observation of Lord Wensleydale in *Hickman v. Cox*, which my lord has referred to. It has never been overruled. The distinction taken by it was approved of by Coleridge, J., when *Cox v. Hickman* was before the Exchequer Chamber, 3 C. B. N. S. 523, and is referred to without disapproval in the most recent edition of *Smith's L. C.*, vol. 1, p. 19; *Tudor's L. C.*, Merc. Law, p. 793; *Kerr on Fraud*, p. 229.

The stipulation is one which cannot in itself be said to be unreasonable, and in such a case as this I should be disposed to say it was a prudent and beneficial one, which no creditor who did not wish to defeat the deed by means of it would object to.

I refer further to *Ontario Bank v. Lamont*, 6 O. R. 147, where an assignment was upheld on this point by the learned Chancellor, whose views as to the discretion and duties of the trustee under such an instrument have, if I may respectfully say so, my entire assent.

It was urged in support of the deed that the debtor was induced to execute it by means of pressure. That doctrine is invoked by a preferred creditor to rebut the presumption that the deed was the voluntary act of the debtor, in other words, to rebut the intent to prefer. It can have no application to a deed of this kind, which whether the voluntary act of the debtor, or due to the urgency of creditors, is valid only, apart from other considerations, if it contains no unreasonable stipulations. But where these exist there can be nothing to rebut the inference that the deed was made to delay, hinder, and defraud creditors within the letter and spirit of the Act.

PATTERSON, J. A.—I have had an opportunity of reading the opinion just pronounced by my Brother Osler, and entirely agree with the views expressed by him, and concur in dismissing the appeal.

*Appeal dismissed, with costs.*—[HAGARTY, C. J. O.,  
dissenting.]



# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN

## THE COURT OF APPEAL,

CONTAINED IN THIS VOLUME.

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### ABSENT DEFENDANT.

*See* MORTGAGE, 1.

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### ACCIDENTAL OMISSION OF CLAIM FROM SCHEDULE OF DEBTS.

*See* ASSIGNMENT FOR BENEFIT OF  
CREDITORS, 3.

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### ACTION AT LAW.

*See* MUNICIPAL BY-LAW.

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### ADMINISTRATION.

In 1876 J. F. O'S. died intestate in New Brunswick, and the plaintiff, his brother, endeavoured to obtain the administration of his estate, but, owing to his financial position, was unable to do so, until the defendant W. and one J., consented to become security for him, which they did on being indemnified. Letters were accordingly granted to him, and the several securities belonging to the estate converted into money, except

some English railway stock, which was handed over to the defendants, but which the plaintiff declined to assist them in realizing. In pursuance of an agreement to that effect, proceedings were instituted in one of the Probate Courts in New Brunswick with a view of ascertaining the next of kin and to obtain a final decree for the distribution of the estate, when it was ascertained that six other persons were so entitled, and on the taking of the accounts in July, 1878, it appeared that each was entitled to \$1,135.11, but owing to the plaintiff's continued refusal to join in disposing of the scrip, the defendants, in whose hands the funds of the estate had been deposited, were unable to settle with several persons entitled. The plaintiff made a claim of \$2,500 upon the estate for his commission and expenses incurred in getting in the estate, and in November, 1880, filed a bill to compel the defendants to pay \$1,000 commission and his share of the estate, and also to hand over to him the shares of the other next of kin. At the hearing a decree was made declaring the defendants entitled to their costs as between solicitor and



client, and ordering the plaintiff to execute all papers necessary to dispose of the railway stock; directed the defendants within two months to settle with the next of kin, other than the plaintiff, and if, after settling with the next of kin, a balance should remain in their hands, they should pay such balance to the plaintiff.

*Held*, that the defendants were in reality agents for the plaintiff, and that the other persons interested in the estate should not be called upon to pay the costs of the litigation, and the same were properly payable from the share of the plaintiff in the fund. — *O'Sullivan v. Harty*, 76.

[This case has since been argued in the Supreme Court, and now stands for judgment.]

## ADMINISTRATOR, AGENT OF.

*See* ADMINISTRATION — CHATTEL MORTGAGE, 2.

## AGENCY, LIMITATION OF.

*See* PRINCIPAL AND AGENT.

## AGENT OF ADMINISTRATOR.

*See* ADMINISTRATION.

## AGREEMENT FOR ALLOWANCE OUT OF RENT.

*See* LEASE OF LANDS.

## APPEAL, BOND ON—EFFECT OF BOND SECURING DEBT AND COSTS.

*See* VENDOR AND PURCHASER.

## ASSENT OF CREDITOR.

*See* ASSIGNMENT FOR BENEFIT OF CREDITORS, 1.

## ASSIGNEE, COVENANT TO WARRANT AND DEFEND.

*See* PATENT RIGHT.

## ASSIGNEE IN INSOLVENCY, SALE BY.

*See* FRAUDULENT CONVEYANCE.

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent to or knowledge of it by any creditor shewn.

*Held*, affirming the judgment of the County Court, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor: but, *Seemle, per PATTERSON, J. A.*, that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable.—*Cooper v. Dixon*, 50.

2. A deed of assignment for the benefit of creditors, gave power "until the said trustees shall deem it advisable to dispose of the said business, to carry on the same, employing any person or persons as his agent or agents for such purpose if he deemed

it best, paying him or them such reasonable allowance therefor as may be agreed upon, and to supply the said agent or agents with such goods or merchandize as may be requisite for such purpose," and the trustee was not to become liable for the debts or losses of the business in any way except for the distribution of the moneys come to his hands under the deed. There was no evidence of of any intentional dishonesty on the part of the assignor :

*Held*, (reversing the judgment of the County Court), that this provision did not invalidate the deed under R. S. O. ch. 118.

[HAGARTY, C. J. O., dissenting.]—*Alexander v. Wavell*, 135.

3. For the expressed purpose of making a fair and equitable distribution of his property and effects amongst all his creditors, a trader in insolvent circumstances executed a deed of assignment of all his property real and personal in trust to sell the same, and out of the proceeds (1) to pay in full the several debts due or to become due by the assignor to the assignee, and the several other persons and firms designated in a schedule annexed thereto, and if insufficient for that purpose, to distribute the proceeds ratably amongst the several persons and firms named in the said schedule; and secondly to return any surplus to the assignor. A claim for \$26.86, which the Court below held to be established, was in ignorance or by inadvertence omitted from such schedule, and the defendant, a scheduled creditor, obtained judgment for \$1,780.75; and under his execution the sheriff seized the goods. The Common Pleas Division held the deed to be invalid in conse-

quence of the omission of such claim for \$26.86.

On appeal, this Court being equally divided, the appeal was dismissed, with costs.

HAGARTY, C. J. O., and BURTON, J. A., affirming the judgment of the Common Pleas Division 32 C. P. 524.

PATTERSON, J. A., and CAMERON, C. J., *held*, that the alleged debt of \$26.86 upon the evidence set out in the case was not proved; and that even if proved, its omission from the schedule did not, under the circumstances, shew the intent necessary to invalidate the deed under R. S. O. ch. 118, sec. 2.

*Per* HAGARTY, C. J. O., there having been apparently no discussion at the trial, or in the Divisional Court as to the sufficiency of the evidence on which the alleged debt was held to be proved, the existence of such debt should not be treated as open to question in this Court.

*Per* HAGARTY, C. J. O., and BURTON, J. A., (dissenting from the opinion of WILSON, C. J., in *Thorne v. Torrance*, 18 C. P. at p. 35,) the creditor omitted could not now be admitted to the schedule. *Contra per* PATTERSON, J. A., and CAMERON, C. J.

Remarks *per* CAMERON, C. J., as to the circumstances under which a provision for the payment of rent and taxes as a first charge would or would not be an objection.

Remarks *per* BURTON, J. A., and CAMERON, C. J., as to the object and effect of the proviso to R. S. O., ch. 118, sec. 2.

*Quere*, *per* CAMERON, C. J., whether the omitted creditor not having obtained judgment and execution, the defendant could take advantage

of such claim to defeat the plaintiff's right. *McLean v. Garland*, 405.

[Reversed in Sup. Court.]

4. An assignment in trust for creditors, amongst other things, authorized the trustee to sell for cash or on credit, and if on credit, with or without security for the balance of purchase money remaining unpaid, and also to pay in full any debts which constituted a lien on the assets where deemed advisable in the interest of the trust.

*Held*, (affirming the judgment of the Court below 2 O. R. 525) that the introduction into the trust deed of power to sell, which was so given in good faith, did not invalidate the assignment.

*Held*, also, that the discretion vested in the trustee to pay such liens in full did not invalidate the deed. *O'Brien et al. v. Clarkson*, 603.

5. By a deed of assignment for the benefit of creditors the trust was declared to be "to sell and dispose of such portions of the said estate as shall be readily saleable either for cash or credit, or under the power hereinafter contained to carry on the said business. \* \* and to stand possessed of the said moneys, &c., and all profits and increase arising therefrom, in trust to pay," &c., and a subsequent part of the deed provided that the assignee "shall have power to employ the said party of the first part [the insolvent] or any other person in winding up the affairs of the said trust estate, in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade."

*Held*, (affirming the judgment of the County Court, *HAGARTY*, C.J.O., dissenting) that the provisions above set forth did not invalidate the deed. *Jennings v. Moss et al.*, 696.

## ATTACHMENT OF PROCEEDS.

*See* TRUST FOR SALE, &c.

## AVOWANT SUCCEEDING IN REPLEVIN COURT.

*See* REPLEVIN BOND.

## BELL, NEGLECT TO RING.

*See* RAILWAY COMPANY.

## BREACH OF CONTRACT.

The plaintiff agreed to complete and set up by a certain day a steam-engine and machinery in defendant's mill in which he had previously been using water power, but failed to complete it for some time afterwards. The Master at Owen Sound, in estimating defendant's damages, allowed him, for loss of profits, in addition to rental of the mill and interest on the value of the machinery and of logs waiting to be sawed, \$118. On appeal from his report, *PROUDFOOT*, J., made an order declaring "that the true measure of damages the defendant is entitled to claim is the amount which would have been earned by the mill in the ordinary course of employment," and referred it back to the Master to review his report.

On appeal therefrom to this Court the judgment was reversed; the Court being of opinion that the Master had been sufficiently liberal in his allowance of damages to the defendant for breach of the contract; and that had any greater amount of damages been given it could have been allowed as speculative damages only. *Corbet v. Johnson*, 564.



## BREACH [OF WARRANTY.]

See SALE OF MACHINE.

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## CHATTEL MORTGAGE.

1. A judgment or execution creditor is entitled to impeach a chattel mortgage on the ground of an irregularity or informality in the execution of the document, or by reason of its non-compliance with the provisions of the Chattel Mortgage Act (R. S. O. ch. 119); but a creditor who is not in a position to seize or lay on an execution on the property, cannot maintain an action to have the instrument declared invalid.

A creditor in that position can only maintain such a proceeding where the security is impeached on the ground of fraud.—*Parkes v. St. George*, 496.

2. Q. and A. carrying on business as licensed victuallers were indebted to the defendant S., a wine merchant, to the amount of \$1,551.66; and being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefor, which S. agreed verbally to make upon receiving security for such advances as well as such prior indebtedness, and Q. and A. accordingly on the 24th of January, 1882, executed a mortgage to S. on all their stock-in-trade, securing \$2,400, S. agreeing to make the further advances in money and goods, as they should require them in the course of their business, and he did in fact between the date of the execution of the mortgage and the 3rd of March following, advance to them \$300 in money and goods, and the balance of the further advance was ready to be given to them at any time during

that period. The affidavit of indebtedness in the sum of \$2,400 was in the usual form, and the mortgage was duly registered. On the last mentioned date, Q. and A. executed a deed of assignment for creditors to the defendant C. of all their estate, whereupon S., treating this assignment as a breach of the covenant against selling or parting with possession of the goods, seized them in the hands of the assignee and sold the same, undertaking to hold the proceeds subject to the order of the Court. Thereupon the plaintiff, a simple contract creditor of Q. and A., upon a demand due at the date of the mortgage, instituted proceedings seeking to recover payment of his claim for \$101.94 and interest, and also seeking, on behalf of all the creditors of Q. and A., to have the mortgage declared void, and the amount realized on the sale of the goods paid to the assignee.

*Held*, that even if the fact of the mortgage being expressed on the face of it to be made for a sum greatly in excess of what it was proved was due, was such an objection as might render the security void, under R. S. O. ch. 119, as against creditors, yet it being clearly shewn that everything between the parties in connection therewith was done *bonâ fide*, and there being no creditor in a position to seize the goods if the mortgage were set aside, the plaintiff could not succeed, and the Court [PATTERSON, J. A., dissenting] reversed the judgment of the Court below, 2 O. R. 342.)

*Per* PATTERSON, J. A., the mortgage and the affidavits accompanying it, though in their form and statements complying with all that is prescribed by the statute, being untrue in fact rendered the security void.



*Per* BURTON, J. A.—Although no ground was shewn for impeaching the transaction as a fraudulent preference, the mortgage under the Chattel Mortgage Act, R. S. O. ch. 119, was invalid as against creditors who were in a position to attack it, which the plaintiff here was not, and as any informalities in the transaction were cured by the mortgagee having taken possession of the property, the plaintiff could not maintain the action.

*Per* OSLER, J. A.—The agreement between the mortgagors and mortgagee might be looked upon as having been really one for a present advance, though the amount was to be paid out to them as they required it. It was not necessary therefore that it should be set forth in the mortgage under sec. 6 of the Chattel Mortgage Act, R. S. O. ch. 119.

*Barker v. Leeson*, 1 O. R. 114, dissented from, *per* BURTON, J.A.—*Id.*

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## COLLISION AT CROSSING.

*See* RAILWAY COMPANY.

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## COMMISSION ON SALE.

*See* PRINCIPAL AND AGENT.

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## COMMON INFORMER.

*Held*, that the 18 Eliz. ch. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this Province, and therefore the plaintiff, an infant, suing by his next friend could not maintain an action for a penalty under the Election Act.—*Garrett v. Roberts*, 650.

The appellant having omitted to take this objection in the Court be-

low, this Court on allowing the appeal on that ground, refused him his costs of appeal.—*Id.*

A person who sues for a penalty given by the Election Act is a common informer.—*Id.*

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## COMPENSATION UNDER STATUTE.

*See* MUNICIPAL BY-LAW.

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## CONFLICTING EVIDENCE.

Where the evidence is contradictory the Court will not interfere with the findings of the Judge who tried the case. *Cook et al. v. Patterson*, 645.

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## CONSIDERATION EXPRESSED.

*See* CHATTEL MORTGAGE.

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## CONTRACT.

One M., by a written contract, agreed with the defendant for the erection of a dwelling house in two months from date, and if M. neglected to build the house defendant was to be at liberty to purchase material and employ workmen to finish it, and deduct the cost of material, &c., out of the price. The plaintiff agreed to supply M. with lumber to be used in the building, and M., after a portion of the lumber had been placed in the building, gave plaintiff an order on defendant for the sum of \$341.46, expressed to be "for lumber used in your house, one month after the building is finished," which the defendant accepted. M. failed to com-

plete the building, and the defendant employed a third party to do so in accordance with the terms of the agreement.

*Held, per* HAGARTY, C. J. O., and MORRISON, J. A., (affirming the judgment of the County Court), that the defendant was liable to pay the plaintiff, notwithstanding M. did not complete the building.

*Per* BURTON, J. A.—The defendant was entitled to deduct whatever was properly expended in completing the building under the contract, and the balance only remaining in his hands would be applicable to the payment of the order, but this balance according to the evidence was sufficient. *Garner v. Hayes*, 24.

*See also*, MECHANICS' LIEN.

#### CONTRACT TO DELIVER GOODS AT A NAMED POINT.

The defendants agreed to sell to the plaintiff a quantity of tow, to be delivered in the United States at a "Boston point"—that is, a point to which the freight charged was the same as to Boston, Mass. Both parties contemplated the route from the Suspension Bridge as that by which the tow would be sent, and Bellows' Falls, Vt., a Boston point on that railway system, was the place named by the plaintiff, but subsequently he desired to have the tow sent to Franklin, New Hampshire, which was not a Boston point on that railway system, and he agreed to pay the arbitrary or extra freight, which he supposed was five cents per 100 pounds.

The defendants accordingly consigned the goods to "Franklin, N. H.," and in the ordinary course of

transport, they were taken to Boston and thence to Franklin, N. H., where they were received by the plaintiff subject to railway charges greatly exceeding the five cents per 100 pounds.

It happened that Franklin was a Boston point upon the lines of railway with which the Grand Trunk Railway connected at St. Albans, and the defendants had on one occasion shipped two car loads from stations of the Grand Trunk Railway by that route, but in consequence of delays at the St. Albans' custom house, the plaintiff wrote directing the defendants to ship by the Suspension Bridge.

*Held*, that by their contract the defendants were not bound to ship to Franklin, N. H., which was not a Boston point within the contract; and that under the circumstances the plaintiff, and not the defendants, was bound to pay the extra freight.

The judgment of the Queen's Bench Division affirmed; that of the Common Pleas Division reversed. *Symmers v. Livingstone*, and *Symmers v. Livingstone et al.*, 355.

#### CONTRACT TO DELIVER GOODS IN PORTIONS.

The defendants contracted to purchase a quantity of old iron rails from the plaintiff company, to be paid for as each 100 tons were delivered. The plaintiffs consigned 1,150 tons out of 1,300 tons stipulated for, and drew for the amount thereof at the agreed price, which draft the defendants refused to accept under the erroneous belief that a portion of the iron charged for had not been received by them, and informed the plaintiff company of the ground of their refusal to accept the draft.

*Held*, (affirming the judgment of the Q. B. D., 2 O. R. 1) that this refusal to accept was not, under the circumstances, such an act as to warrant the plaintiffs in treating it as a repudiation of the contract, or such as would release the plaintiffs from a further performance of it.

What would amount to such a repudiation considered. *Midland R. W. Co. v. Ontario Rolling Mills*, 677.

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## CONTRADICTORY EVIDENCE

*See* CONFLICTING EVIDENCE—  
VERDICT OF JURY.

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## CONTRIBUTORY NEGLIGENCE.

*See* RAILWAY COMPANY.

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## CONVEYANCE OBTAINED BY UNDUE INFLUENCE.

*See* UNDUE INFLUENCE.

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## COSTS.

*See* ADMINISTRATION—REPLEVIN  
BOND.

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## DAMAGES.

*See* BREACH OF CONTRACT—EX-  
ECUTION — MUNICIPAL BY-LAW —  
REPLEVIN BOND.

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## DAMAGES—QUANTUM OF.

*See* SALE OF MACHINE.

## DISCRETION OF JUDGE.

*See* ORAL EVIDENCE, &c.

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## DISCRETION OF TRUSTEE.

*See* ASSIGNMENT FOR BENEFIT OF  
CREDITORS, 2.

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## DIVIDEND, RECEIPT OF.

[IN INSOLVENCY PROCEEDINGS.]

*See* FRAUDULENT CONVEYANCE.

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## ELECTION ACT, PENALTY UNDER.

*See* COMMON INFORMER, 3.

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## ESCHEAT.

*See* ILLEGITIMATE CHILDREN.

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## EXECUTION.

The defendant, a bailiff of a Division Court, under an execution against plaintiff's father, seized two horses, waggon, &c., which, on an interpleader proceeding, were decided to be the goods of the plaintiff, who at the end of three weeks obtained possession of them from the bailiff. In an action brought by the plaintiff against the defendant for damage done to the horses during the time they were in his possession, the jury, under the direction of the Judge, found a verdict for the plaintiff and \$80 damages, which verdict the Judge subsequently refused to set aside.

*Held* (affirming the judgment of the County Court), that the finding of the Judge on the interpleader

proceedings formed no ground of defence to the suit for damages for the alleged injury to the property. *Farrow v. Tobin*, 69.

See also, FRAUDULENT CONVEYANCE.

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### FACILITATING THE RECOVERY OF JUDGMENT.

See FRAUDULENT PREFERENCE.

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### FINDING OF JUDGE AT TRIAL.

See CONFLICTING EVIDENCE.

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### FRAUD, WANT OF EVIDENCE OF.

See PRESSURE.

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### FRAUDS, STATUTE OF.

See MECHANICS' LIEN, 2.

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### FRAUDULENT CONVEYANCE.

F. being about to indorse notes for the accommodation of B., conveyed his real estate to O., who then conveyed to the wife of F. Afterwards F. became an insolvent under the Insolvent Act of 1875, and the assignee took proceedings to impeach the transaction, the result of which was, that it was declared fraudulent and void as against the assignee, who thereupon advertised the property for sale, and sold it as part of the estate of F. to the defendants.

Pending these proceedings the plaintiff had obtained execution on a judgment against F.'s wife, on promissory notes made by her and F., under which the sheriff, after the

sale by the assignee, sold all her right, title, and interest in the same property to the plaintiff. The plaintiff proved his claim on the notes and received a dividend in the insolvency proceedings against F.

*Held*, (1) that he was not estopped by the receipt of the dividend nor by the decree obtained in the suit of the assignee (to which he had not been made a party) from asserting that the property belonged to F.'s wife and was exigible under his execution against her; but (2), that the conveyance to her being in fact shewn to be fraudulent and void against the assignee in insolvency, the plaintiff had acquired no title by the sheriff's sale to himself under the execution, and that the title of the defendants who were in possession under the assignee could not be impeached by the plaintiff.

*Miller v. Hamlin*, 2 O. R. 103, as to the effect of the receipt of a dividend, distinguished.—*Beemer v. Oliver*, 656.

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### FRAUDULENT PREFERENCE.

1. M. being in insolvent circumstances, gave to one of his creditors a memorandum shewing a stated account as then due of "\$32,155.38 cash at this date." This amount was arrived at by allowing the usual trade discount between the parties upon claims which were not then actually due. The creditor was at the time aware of M.'s insolvency. On the day following, the creditor sued out a writ of summons against M. specially indorsed under order 3, rule 4, for above amount, and in due course recovered judgment for default of appearance. The creditor then issued execution immediately,



and placed the same in the hands of the sheriff. The plaintiff began proceedings for an overdue debt against M. after the commencement of the above suit, and recovered judgment under rule 324, and placed his writ in the hands of the sheriff six days after the execution of the defendants above referred to.

The defendants subsequently purchased the goods under these and other executions.

*Held*, affirming the judgment of the Q. B. D., 2 O. R. 243, that the facility thus afforded on the part of M. did not constitute a fraudulent preference within the meaning of R. S. O. ch. 118.

*Young v. Christie*, 7 Gr. 812, and cases following it, approved and followed.—*Macdonald v. Crombie et al.*, 92.

[Affirmed in Supreme Court.]

2. J. M., who was in insolvent circumstances, with the concurrence if not at the instance of his brother, who was liable as indorser on some of the insolvent's paper held by the defendants S. & M., effected a sale of all his (J. M.'s) stock-in-trade, book debts, &c., to a *bonâ fide* purchaser at 60c. in the dollar; the proceeds of the sale he paid to S. & M., and they credited a portion thereof on the notes indorsed by the brother.

*Held*, that this was not liable to be impeached as a fraudulent preference of S. & M. *Harvey v. McNaughton*, 616.

See also CHATTEL MORTGAGE, 2.—PRESSURE.

## FREIGHT EXTRA AND ARBITRARY, LIABILITY FOR.

See CONTRACT TO DELIVER GOODS, &c.

## FUTURE ADVANCES.

See CHATTEL MORTGAGE, 2.

## GARNISHEE PROCEEDINGS.

See TRUST FOR SALE, &c.

## GRATUITOUS BAILEE.

See INNKEEPER.

## HALF BREEDS' RIGHTS.

The plaintiff had agreed with the defendant to purchase the claim to land scrip in Manitoba of a half-breed, and defendant procured to be assigned to plaintiff the claim of one alleged to be the child of a half-breed. This proved to be erroneous, and the scrip which had been issued to him was worthless.

*Held*, affirming the judgment of the County Court, that the plaintiff was entitled to recover from the defendant the amount paid by the plaintiff for the purchase of the so-called right; the plaintiff to assign to the defendant *quantum valeat*, the land scrip he had received. *Burns v. Young*, 215.

## ILLEGAL CONSIDERATION.

The defendant R. having been charged with misapplying fines paid into his hands as a justice of the peace, and proceedings instituted against him in respect thereof, the plaintiff, pending an investigation of the charge, volunteered his aid to assist R. in effecting a settlement of the amount claimed by the municipality, which he undertook to dis-

charge upon the defendant R. giving his promissory note for the amount, indorsed by his wife. The plaintiff thereupon settled the amount claimed by giving his note therefor, which he alleged he had subsequently paid, and the defendants joined in a promissory note in the manner proposed by the plaintiff.

*Held*, (affirming the judgment of the Court below, 2 O. R. 25), that the transaction in effect amounted to a compromise of a criminal charge, and therefore that plaintiff was not entitled to recover on the note given by the defendants. *Bell v. Riddell*, 544.

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### ILLEGITIMATE CHILDREN.

The testator, by his will, gave all his real and personal estate to his two illegitimate children, D. and E., with the right of survivorship, and appointed the defendant C., who was his medical attendant, executor and also guardian of the children. The real estate, valued at \$1,600, was subject to a mortgage in favor of one W. for \$200. The children died in infancy, D. having been the survivor, and shortly after his death the defendant wrote to the next of kin of the testator informing him of the decease of D., and expressing a desire to transfer to him all the testator's estate. During D.'s lifetime the defendant had paid his interest on the mortgage, either from his own funds or moneys of the estate, and had agreed with W. for the purchase of the mortgage, and within two months after writing the letter referred to paid to W. the amount of principal and interest remaining due on the mortgage, and obtained from him a transfer thereof. The plaintiffs, being advised that the estate of D. had escheated to the

Crown, subsequently obtained from the Lieutenant-Governor a grant of all interest of the Government in such estate, and procured letters of administration from the proper Court to be issued to them, whereupon they instituted proceedings against C. for an account of his dealings with both estates, who set up a right to hold all the interest of D., who died intestate and who, as well as the testator, died without owing any debts other than one due the defendant himself by the testator. Judgment was pronounced by FERGUSON, J., declaring (by the second clause thereof) that the mortgage and the lands comprised therein formed part of the estate of the testator; directing the usual administration accounts, payment of debts and an assignment of the estate to the plaintiffs, which on appeal to this Court was affirmed:

BURTON, J. A., dissenting, who thought such second clause should be struck out, without prejudice to the right of the plaintiffs to give such further evidence in the Master's office as they should be advised, but that with this variation such judgment should be affirmed. *Simpson et al. v. Corbett*, 32.

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### INCAPACITY TO SUE.

*See* COMMON INFORMER.

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### INFANT.

*See* COMMON INFORMER.

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### INFORMER.

*See* COMMON INFORMER.

## INFRINGEMENT OF PATENT.

*See* PATENT OF INVENTION.

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INNKEEPER.

The plaintiff had been for some time a guest of the defendant, an innkeeper, and on leaving the inn, after paying his bill, was allowed to leave a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing luggage, &c. The plaintiff intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost: there was no other evidence of any negligence in the matter.

*Held*, reversing the judgment of the County Court, that the plaintiff could not recover. *Palin v. Reid*, 63.

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INSOLVENT, SALE BY.

*See* FRAUDULENT PREFERENCE, 2—  
PRESSURE.

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INTEREST ON JUDGMENT.

Where an appeal is brought against a judgment in any personal action which is affirmed on appeal, interest on the judgment is by force of the statutes allowed for such time as execution has been stayed by the appeal; but where the plaintiff refrained from entering up his judgment until after the decision in appeal this Court refused to order interest to be allowed on the amount of the verdict, leaving the plaintiff to apply to the Court below for relief by entering the judgment *nunc pro tunc*. *McEwan v. McLeod*, 96.

## INTERPLEADER PROCEEDINGS.

*See* EXECUTION.

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JUDGMENT CREDITOR.

*See* CHATTEL MORTGAGE, 1.

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LEASE OF LANDS.

The plaintiff rented to the defendant a field for the purpose of growing flax at an agreed rental of \$10 an acre. In answer to the claim for rent, the defendant attempted to shew that he had sustained damage by reason of the ground being full of thistles, and that it had been stipulated that an allowance was to be made in such case, for the loss to the defendant,

*Held* (affirming the judgment of the County Court), that evidence was properly admitted for the guidance of the jury, in adjusting such allowance, as to how the defendant had himself settled with other persons who had thistles in their fields rented by him. *Weinhold v. Klein*, 20.

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LIABILITY OF RAILWAYS  
FOR NEGLIGENCE.

*See* RAILWAYS, &c.

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LOSS OF PROFITS.

The right to recover for loss of profits discussed. *Corbet v. Johnson*, 564.

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MALA FIDES, WANT OF.

*See* ASSIGNMENT FOR BENEFIT OF CREDITORS, 3.

## MEASURE OF DAMAGES.

See BREACH OF CONTRACT.

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## MECHANICS' LIEN.

1. The plaintiffs contracted with one C. for the execution of the stone work upon certain buildings which C. had contracted to build. C. never completed the work, but during the progress thereof was paid in good faith the full value of the work actually done by him on the building before he abandoned the contract.

*Held* (reversing the judgment of the County Court,) that a sub-contractor with C. could not enforce payment of his claim to the extent of ten per cent. of the contract price under the Act R. S. O. ch. 120, sec. 11, as amended by 41 Vict. ch. 17, sec. 1.

*Quære*, as to the meaning and effect of that clause. *Goddard et al. v. Coulson et al.*, 1.

2. The defendant H. contracted with the defendant C. for the building of a house. A clause in the agreement gave H. a right to dismiss C., and employ others to finish the work, in the event of C.'s failure to carry out the contract. H. acting thereunder dismissed C. and agreed verbally with the respective plaintiffs P. & G., who had sub-contracts under C., that if they would proceed with their respective portions of the work and finish the same, he (H.) would pay them.

*Held*, affirming the judgment of the Boyd, C., 2 O. R. 233, that the agreement with P. & G. was a new and independent contract, not a promise to pay the debt of another, and

that P. & G. were entitled to liens for all work done under such agreement with H. as contractors. *Petrie v. Hunter et al.*—*Guest et al. v. Hunter et al.*, 127.

3. The period of 90 days, limited by the 21st sec. of the Mechanics' Lien Act (R. S. O. ch. 120) for the commencement of proceedings to enforce the lien, applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that, whether proceedings have or have not been previously taken against the owner within the 90 days. *Bank of Montreal v. Haffner*, 592.

The plaintiffs, assignees of a mechanic's lien, brought an action against the owner and a prior mortgagee, but their action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien against the owner they brought this action, after the lapse of more than 90 days from filing their lien, to obtain a declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land.

*Held*, (reversing the judgment of FERGUSON, J., 3 O. R. 183), that the lien had ceased to exist as against the mortgagee. *Ib.*

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## MENTAL CAPACITY.

On the trial of an issue, directed by the Surrogate Judge, before a jury, evidence was given as to the mental capacity of the testator by persons acquainted with him, the grant of probate being opposed by the widow on the ground, amongst others, of mental incapacity. The Judge at the trial being of opinion



that the witnesses examined were not of a class qualified to give scientific evidence as experts, withdrew the case from the jury, and gave judgment in favour of the plaintiffs, granting probate of the will, which he afterwards refused to set aside.

On appeal, a new trial was directed, and the costs of appeal ordered to be paid by the plaintiffs, it being held that the case should have gone to the jury, and that the opinions of such witnesses were clearly admissible, being of more or less value according to their skill, or experience or aptitude for judging of such matters, all which tests would be applied by the jury. *Regan et al. v. Waters*, 85.

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### MERGER.

*See* MORTGAGE, &C., 2.

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### MORTGAGE, MORTGAGEE, MORTGAGOR.

1. Proceedings were instituted, in 1876, against two persons interested in a mortgage estate, one of whom was resident out of the jurisdiction, and the usual decree and account was made and taken. The application to make such decree absolute was not made until May, 1882, and in the early part of the month following a petition was presented praying that the defendants might be allowed to redeem, alleging the ignorance of the absent defendant of the proceedings until his return to the country, a few days before signing the petition, and the ignorance of both defendants of any proceedings subsequent to the filing of the bill; and that the defendant upon whom the bill was served was about ninety years old,

and of feeble intellect, unfitted to transact business.

It was shewn that in March, 1882, before the order making the decree absolute, the plaintiffs had sold to one Grattan, who bought, relying on the plaintiffs' title under the final order of foreclosure, which, on its face, was expressed to be subject to the G. O. of Chancery, 114-5-6.

Under the circumstances the Court (reversing the order of Boyd, C.), made an order to open the foreclosure on the terms of paying principal, interest, and costs of plaintiffs, and of the purchaser (not including any costs of the appeal, of which each party should bear their own), together with any costs incurred by the purchaser in connection with his purchase of the property, and in default of payment on or before the day appointed for payment the appeal to be dismissed with costs. *Trinity College v. Hill*, 99.

2. The defendant having mortgaged certain lands, conveyed them to one P., and afterwards, becoming insolvent, he included this in his schedule as an indirect liability. The conveyance was silent as to whether it was a sale of the equity of redemption merely, or of the whole estate, the payment of the mortgage being part of the consideration, but from the evidence the Court inferred the latter. The mortgagee who had been no party to the arrangement, afterwards obtained from P. the equity of redemption which he caused to be assigned to his wife, in order as he said to prevent a merger; and he then sued the defendant on the covenant for the mortgage money.

*Held*, that there was no merger, and that the plaintiff was entitled to recover. *Macdonald v. Bullivant*, 582.

See also, ILLEGITIMATE CHILDREN.

### MUNICIPAL BY-LAW.

In pursuance of the powers conferred by secs. 551 and 553 of the Municipal Institutions Act, R. S. O. ch. 174, the council of the defendant municipality passed a by-law authorizing the paving of F. street with cedar blocks, which work was proceeded with, but executed in such a manner as to cause water to flow over and rest upon the lands of the plaintiff.

*Held*, [affirming the judgment of PROUDFOOT, J., who found that the work had been negligently performed], that the plaintiff was entitled to recover the amount of damages sustained by her, and to enjoin the defendants from further overflowing her land; and that in consequence of such negligence her proper remedy was by action; not by a proceeding under the statute for compensation. *McGarvey v. The Corporation of the Town of Strathroy*, 631.

### MUNICIPAL DRAINAGE.

A drain constructed by a municipality wholly within the limits thereof, having fallen into disrepair, the plaintiff, whose lands were injured thereby, notified the council, calling upon them to repair, which they omitted to do:—

*Held*, (affirming the judgment of the Q. B. D. (2 O. R. 287), that the plaintiff was entitled to damages in respect of his lands so injuriously affected, the result of such neglect to repair; that the case came under sec. 542, R. S. O. ch. 174; and that

if it did not he would be entitled to recover under section 543, for the neglect of the statutory duty to repair as directed thereby. *White v. The Corporation of the Township of Gosfield*, 555.

### MISREPRESENTATION BY PURCHASER.

See VENDOR AND PURCHASER.

### NEGLECT OR REFUSAL.

See RAILWAY ACTS, 3.

### NEGLECT TO REPAIR DRAINS.

See MUNICIPAL DRAINAGE.

### NEGLECT TO SOUND BELL OR WHISTLE.

See RAILWAY COMPANY.

### NEW TRIAL.

See ORAL EVIDENCE, &c.

### NONSUIT.

See RAILWAY COMPANY.

### NOVELTY, WANT OF.

See PATENT OF INVENTION.

## ORAL EVIDENCE TO EX- PLAIN AGREEMENT.

The plaintiffs agreed to sell to the defendants a waterwheel, "and place the same in position" for \$150, but the defendants refused payment upon the ground that the wheel had not been properly placed, and did not in fact, perform the work stipulated for. The jury found for the defendants, and the Judge of the County Court granted a new trial—costs to abide the event. On appeal this Court refused to interfere with the discretion of the Judge of the Court below, considering that the term "placed in position" was so indefinite that the defendants were at liberty to shew what was meant thereby; the writing, by such parol evidence not being added to or varied, but only rendered intelligible. *Harris v. Moore et al.*, 10.

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## PAROL EVIDENCE OF WARRANTY.

See SALE OF MACHINE.

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## PATENT OF INVENTION.

*Held*, reversing the judgment of Proudfoot, V. C., reported 28 Gr. 489; that the combination of the tilting grate and the feed door above the sole of the oven mentioned in the specification of the plaintiff as the first subject of claim for a patent, was so wanting in novelty as to render the patent obtained in respect thereof invalid. [PATTERSON, J.A., dissenting. *Hunter v. Carrick*, 449.

[Now standing for judgment in the Supreme Court.]

## PATENT RIGHT, ASSIGN- MENT OF.

In 1875 J. R. obtained letters patent for improvements in "Harvesters," and sold and assigned to the plaintiffs the exclusive right to manufacture and sell the same, and to sell such right to other persons. In the same year the plaintiffs executed a deed to the defendant, assigning to the defendant the exclusive right to manufacture and sell such "Harvesters" in certain counties, he paying \$10 royalty on each one to be manufactured by him. It was then covenanted by and on the part of the plaintiffs that the original patentee, J. R., would warrant and defend the defendant in the possession of the said patent within the territory thereby granted, and further agreed that if J. R. neglected or refused to protect and defend him in his peaceable possession of the said patent, then the royalty agreed to be paid by him should cease.

*Per* HAGARTY, C. J. O., and MORRISON, J. A., the plaintiffs under this covenant were liable only to the defendant in case J. R. neglected to defend him against all persons having a right to manufacture and sell the machines, not as against mere wrong-doers.

*Per* BURTON and PATTERSON, JJ. A., that the terms of the covenant bound J. R. to protect the defendant against all infringers, the rule of construction of covenants to "warrant and defend," as applied to lands, not having any application in cases like the present. *Green et al. v. Watson*, 113.

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## PAVING STREETS. See MUNICIPAL BY-LAW.

## PAYMENT OF PROCEEDS OF SALE TO ONE CREDITOR.

See FRAUDULENT PREFERENCE, 2.

## PERIOD OF VESTING.

See WILL, &c., 1.

## PRACTICE.

1. The Judge, at the trial in the County Court, entered a verdict for the plaintiff, instead of directing judgment to be entered; and afterwards refused a rule *nisi* to set aside such verdict. Rule 405 of the O. J. A. in effect forbids the granting of any rule to shew cause where the application is against the judgment of a Judge who tries a cause without a jury. *Williams v. Crow*, 301.

2. *Quere*, as to the application of this rule to County Courts by Rule 490, but, *Held*, per PATTERSON, J.A., that the entry of the verdict might be treated as a direction to enter judgment, and was a decision from which an appeal would lie under Rule 510. *Ib*.

3. An objection to an appeal from a Judge refusing such rule might be raised by motion in Chambers, but it was not obligatory to raise it in that manner. *Ib*.

4. Per OSLER, J.A.—*Seemle*, that the effect of R. S. O. ch. 50, s. 352, is to make the Imperial Act 5 and 6 Vict. ch. 97, s. 2, as to costs in cases of replevin on a distress for rent in arrears applicable to our practice. *Ib*.

See also COMMON INFORMER—INTEREST ON JUDGMENT—REFERENCE OF MATTERS PROPER TO BE TRIED BY JUDGE.

## PRESSURE.

A trader who was in insolvent circumstances, and for whom the plaintiff E. was liable as indorser on notes discounted at a bank and then current, was urged by him for a settlement and security, which, however, he refused to give, but offered to sell E. the whole of his stock in trade, household furniture, &c. E. accordingly bought it, paying the vendor the sum of \$1,400, the excess in value of the goods, over and above the notes, which he retired the same day.

Next day the vendor absconded, but the evidence failed to satisfy the Court that E. intended to commit any fraud in the arrangement so carried out.

*Held*, [affirming the judgment of the Court below] that although E. was aware that the debtor was in pecuniary embarrassments, the transaction in the absence of proof of *mala fides* was not liable to be impeached as a fraudulent preference. *Lewis v. Brown, Balfour & Co.*—*Elliott v. Brown, Balfour & Co.*, 639.

## PRINCIPAL AND AGENT.

The defendant at the instance of the plaintiff, placed his, the defendant's, farm in his hands for sale, subject to the payment of a certain commission in case the farm should be disposed of through him, and if the defendant himself sold without the aid of the plaintiff, the commission should be only one-half. The defendant alleged that it was a term of the arrangement that if the land remained unsold at the end of two years the agreement should cease.

*Held*, that if parol evidence as to the limitation of time, was not ad-



missible, the law would infer its continuance for a reasonable time only; and that in deciding what was a reasonable time the time spoken of by the parties which was two years, might be considered.

*Per* BURTON and PATTERSON, JJ. A., such parol evidence was admissible.

*Held*, also, that the defendant having refused to sell to a proposed purchaser found by the plaintiff, the plaintiff was not entitled to recover his full commission as on a sale, but the value of his services as on a *quantum meruit* or damages for the defendant's wrongful refusal. *Adams v. Yeager*, 497.

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### PRIORITY.

*See* MECHANICS' LIEN, 3.

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### PROMISSORY NOTE.

*See* ILLEGAL CONSIDERATION.

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### PURCHASE MONEY, EFFECT OF LEAVING PART OF, IN HANDS OF PURCHASER.

*See* VENDOR AND PURCHASER, 2.

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### PURCHASER, MISREPRESENTATION BY.

*See* VENDOR AND PURCHASER, 1.

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### QUANTUM MERUIT.

*See* PRINCIPAL AND AGENT.

### QUANTUM OF DAMAGES.

*See* SALE OF MACHINE.

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### RAILWAY ACTS.

1. The Railway Act of 1879, 42 Vict. ch. 29 (D.), removed the Grand Trunk Railway Company from the operation of the General Railway Act of the Dominion, to which it had been for a short time subject under the provisions of the Act of 1875. *Vogel v. The Grand Trunk Railway Company*. *Morton v. The Same Company*, 162.

2. The Act of 1879 repealed all the previous Acts of the Dominion in reference to railways, but by section 100 recited that certain enactments, including those contained in sub-sec. 4 of sec. 25 (which were the same as sub-sec. 4 of sec. 20, 1868), had been declared by the Act of 1875 to apply to all railways within the jurisdiction of the Parliament of Canada, and then enacted that they should so apply accordingly. Sub-section 4 declares, that any party aggrieved "by any neglect or refusal in the premises" shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage has arisen from any negligence or omission of the company, or its servants. It was held in the Court below (2 O. R. 197) that *the premises* must be taken to refer to the sections to be found in the repealed Acts.

*Held*, by BURTON and PATTERSON, JJ. A., that no such construction could be given to the words; but that the Grand Trunk Railway was, and always had been, subject to the General Act of the old Province of

Canada (1851), which contained a provision similar to that in section 20, sub-sections 2 and 3, without sub-section 4; the effect of the enactment that that sub-section should apply to all railways extended the restriction to the similar sections in the Act of 1851, and effect could thus be given to the words used.

*Per* MORRISON and OSLER, JJ.A., that the construction adopted by the Court below was admissible, but that at all events, as the provisions of the Railway Act (C. S. C. ch. 66) corresponding to section 20, sub-sections 2 and 3, of 42 Vict. ch. 29, were made applicable to the defendants, effect could in this way be given to the language of section 100. *Ib.*

3. *Quere*, as to the effect of the words "neglect or refusal" in the sections in question. *Ib.*

#### RAILWAY COMPANY.

The deceased, who was well acquainted with the locality, while driving along a road running in the same direction as and crossing the railway, was killed at the crossing by a locomotive, not a regular train. The jury found that the engine was going unusually fast; that the whistle was sounded at another crossing, three-fifths of a mile off, but was not continued; and that deceased was not guilty of contributory negligence.

The Common Pleas Division, upon the evidence more fully stated in the case, refused to disturb this verdict, and on appeal their judgment was affirmed, CAMERON, C. J., dissenting, on the ground that the plaintiff was bound to disprove contributory negligence; that she had failed to do so, for had deceased looked he must have

seen the train coming; and that there should therefore have been a nonsuit.

*Davey v. The London and South-Western R. W. Co.*, 11 Q. B. D. 215; 12 Q. B. D. 70, and *Dublin, Wicklow and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155, commented on.

*Per* PATTERSON, J. A., and ROSE, J., whether admitting *Davey v. The London and South-Western R. W. Co.*, to decide that the plaintiff must negative contributory negligence, it is applicable here, in view of the statutory duty to give warning by bell or whistle, which does not exist in England. *Peart v. The Grand Trunk R. W. Co.*, 191.

[Case since carried to the Privy Council.]

#### RAILWAYS, LIABILITY OF FOR DAMAGE.

The plaintiff shipped a car load of horses on the defendants' railway, for the purpose of being carried thereon. The shipping bill had indorsed on it the following, amongst other, conditions:

"*The owner of animals UNDERTAKES all risks of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, or otherwise howsoever, no matter how caused.*" By the negligence of the servants of the defendants some of the horses were killed.

*Held*, by BURTON, J. A., that the company was not precluded by the terms of the Act of Parliament from making a special contract exempting themselves from liability even in case of negligence on their part.

By BURTON and PATTERSON, JJ. A., that the transaction was not within the statute, being in fact the

hiring of a car, and not a neglect or refusal to perform any of the obligations cast upon the company by the statute.

*Per* MORRISON and OSLER, JJ. A., affirming the judgment of the Court below, that the company could not, by any special contract, relieve themselves from liability for negligence.

*Per* PATTERSON, J. A.—The legislation of the Dominion Parliament forbidding the defendants contracting against liability for their own negligence is not *ultra vires*. *Vogel v. Grand Trunk Railway Company*.—*Morton v. The same Company*, 162.

[Now standing for judgment in the Supreme Court.]

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#### REASONABLE TIME.

*See* PRINCIPAL AND AGENT.

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#### RECTIFICATION.

*See* UNDUE INFLUENCE, &C.

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#### REFERENCE OF MATTERS PROPER TO BE TRIED BY JUDGE.

The plaintiff sued for alleged breach of a contract to sell and deliver a quantity of hay to be inspected. The plaintiff gave evidence of shortage and defective quality, and asked for a reference as to damages; but the learned Judge who tried the case refused the reference, and gave judgment for the defendant.

*Held*, that the matters in question were proper for trial by a Judge, and that the plaintiff was not entitled to give *prima facie* evidence of a breach of contract and then have a reference as to damages. *Cook et al. v. Patterson*, 645.

#### REPLEVIN BOND.

Where the avowant successfully defends a replevin suit, and subsequently institutes proceedings on the replevin bond, he is not entitled to recover as part of his damages the excess of solicitor and client costs of his defence, over and above his taxed party and party costs in the action.

BURTON, J. A., dissenting. *Williams v. Crow*, 301.

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#### REPUDIATION OF CONTRACT.

*See* CONTRACT TO DELIVER GOODS IN PORTIONS.

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#### RESCISSION.

*See* UNDUE INFLUENCE, &C.—CONTRACT TO DELIVER GOODS IN PORTIONS—SALE OF MACHINE.

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#### SALE OF GOODS.

*See* CONTRACT TO DELIVER GOODS IN PORTIONS.

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#### SALE OF LANDS.

*See* VENDOR AND PURCHASER, 2.

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#### SALE OF MACHINE.

The defendant was a manufacturer of steam threshing machines, which were recommended as being safe from fire; that the engine would not throw out sparks, and that the separator, which was sold and used therewith, would not throw out grain in the chaff, and that altogether these were the best threshing ma-

chines in the world. The plaintiff alleged that after hearing these recommendations he sent a written order to the defendant for a steam engine and separator, which when used proved defective, the engine throwing out sparks and the separator wasting the grain by throwing it out with the chaff; and he claimed to have the contract of purchase rescinded and the notes given by him in payment for the machine returned; and \$300 damages.

The Judge at the trial having ruled that the plaintiff could not rescind the contract, but could only recover, as damages for breach of warranty, the difference in value between the machine contracted for and the one which was delivered—the jury found (in answer to questions) that there was a warranty which had been broken and that by such breach the plaintiff had sustained damages to the amount of \$500.

On motion to a Divisional Court: (1) for a new trial on the ground that the findings were against evidence and for excessive damages, or (2) to enter judgment for defendant on the ground that the contract was in writing and therefore parol evidence of warranty was inadmissible. The Common Pleas Division refused a rule; and the defendant appealed as to the principal question, viz.: the admissibility of parol evidence.

*Held*, by HAGARTY, C. J. O., and ROSE, J., that parol evidence was properly admitted—that (as held in *Bennet v. Tregent*, 24 C. P. 565, approved of in *McMullen v. Williams*, 5 A. R. 518), it was a question of fact for the jury whether the written order embodied the whole contract, and therefore their finding on this point was conclusive.

*Held* by BURTON, J. A., and CAMERON, C. J. C. P., that parol evidence of a warranty was improperly admitted.

*Per* BURTON, J. A. (1) When a proposal is made in writing by one party and accepted *ad idem* by the other, either verbally or by acting upon it, the contract is a written one. (2) If the writing embodies the contract, the Judge is bound to exclude all evidence to shew that the real intention of the parties was different from that which appears in the writing. (3) A warranty, though a collateral undertaking, is part of the contract of sale, and, if the contract is in writing, antecedent representations, not embodied in the written contract, are not warranties, and cannot be proved unless it is shewn that they were fraudulently made and the contract was so induced. (4) If the contract is not reduced to writing, or if, though there is a written document, the evidence leads *the Court* to infer that the writing does not contain the whole agreement, it is for the jury to say whether antecedent representations did or did not amount to warranties. In this case there was no admissible evidence of a warranty, and the judgment should be for the defendant.

*Per* CAMERON, C. J. C. P., the plaintiff's claim on the pleadings was for breach of a contract not proved by the evidence, and no amendment should be allowed to change it into an action for breach of warranty; but there should be a new trial.

As to the question of damages.

*Per* HAGARTY, C. J. O., and ROSE, J., the damages claimed in the pleadings were claimed upon the basis of a rescission of the contract and return of the notes. The damages awarded were for a breach of warranty, the



plaintiff keeping the machine and paying for it ; and there was evidence to support the finding of the jury as to damages.

*Per* CAMERON, C. J. C. P. There was no evidence from which the plaintiff's damages for breach of warranty could be reasonably ascertained, and for this reason also there should be a new trial.

The Court being equally divided, the appeal was dismissed.—*Ellis v. Abell*, 226.

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#### SCHEDULE, OF DEBTS, ACCIDENTAL OMISSION OF CLAIM FROM.

*See* ASSIGNMENT FOR BENEFIT OF CREDITORS.

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#### SCRIP, TRANSFER OF.

*See* HALF BREEDS' RIGHTS.

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#### SERVICE.

*See* MORTGAGE, 1.

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#### SHERIFF, SALE BY.

*See* FRAUDULENT CONVEYANCE.

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#### SIMPLE CONTRACT CREDITOR.

*See* CHATTEL MORTGAGE, 1.

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#### SPECIALTY CREDITOR.

*See* CHATTEL MORTGAGE, 1.

#### SPECULATIVE DAMAGES.

*See* BREACH OF CONTRACT.

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#### STATED ACCOUNT, SIGNING ADMISSION OF.

*See* FRAUDULENT PREFERENCE, 1.

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#### STIFLING PROSECUTION.

*See* ILLEGAL CONSIDERATION.

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#### SUB-CONTRACTOR.

*See* MECHANICS' LIEN, 1, 2.

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#### SURROGATE COURT.

*See* MENTAL CAPACITY.

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#### TRUSTEE FOR CREDITORS, POWER OF TO SELL ON CREDIT.

*See* ASSIGNMENT FOR BENEFIT OF CREDITORS, 4.

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#### — TO PAY LIENS IN FULL.

*See* ASSIGNMENT FOR BENEFIT OF CREDITORS, 4.

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#### TRUST FOR SALE AND TO PAY BENEFICIARY.

E. A. conveyed real and personal estate to one B. upon trust, to convert the same into money, and pay debts, &c. ; and as to any balance

remaining upon trust to pay the same to R. A., son of E. A., or if B. should see fit he might invest the same in the purchase of a homestead, and convey the same to R. A. in fee.

*Held*, reversing the judgment of the County Court, that there was no debt due from B. to R. A. which could be garnished by the creditors of R. A. *McKindsey v. Armstrong*, 17.

### UNDUE INFLUENCE, CONVEYANCE OBTAINED BY.

In an action to restrain waste it was shewn that the plaintiff obtained from his father a deed of the premises in question, the father swearing that he supposed when executing the document that it was his will he was making, and the conveyancer who prepared the deed admitted in his evidence that he might have suggested to the subscribing witness to the deed not to talk too much to the old man about the writing, as perhaps he would not sign it; and the deed as prepared was silent altogether as to certain provisions and payments that were to be made as alleged by the plaintiff. The Court reversed the decree pronounced by the Court below, directing the deed to be reformed; and ordered the bill to be dismissed, with costs, and the deed to be delivered up to be cancelled. *Dunlop v. Dunlop et al.*, 670.

### VENDOR AND PURCHASER.

1. The plaintiff negotiated with the defendants Griffith for the purchase of the lands in question, and at different times obtained from them writings giving him the option to purchase for \$20,000. Defendants

Griffith set up that these negotiations were had with plaintiff as their agent with the view of effecting through him a sale to the Independent Order of Odd-fellows at the same or a higher price for the defendants Griffith. After these options had been given to the plaintiff, he, on the forenoon of the 17th February, 1882, agreed to sell to the Odd-fellows for \$25,000; and afterwards on the same day he went to the defendants Griffith and offered to purchase for \$19,500 in lieu of the \$20,000 previously named. He was asked by the Griffiths whether the sale to the Odd-fellows was off, to which he replied that it was, and in the same conversation informed the Griffiths that he could not sell the property for \$20,000, as a reason why he should get it for \$19,500, for if sold to another, he, plaintiff, would be entitled to a commission of \$500; and the Griffiths thereupon agreed to sell to plaintiff for \$19,500. Subsequently on the same day plaintiff entered into a contract in writing to sell to the Odd-fellows for \$25,000.

*Held*, that without reference to the question of agency to sell, the evidence shewed that a sale to the Odd-fellows was in contemplation of both parties and was the foundation of the transaction, and (reversing the judgment of Proudfoot, J.) that the misrepresentation by the plaintiff in regard to the sale to the Odd-fellows, was such as disentitled him to a decree for specific performance. *BURTON, J. A., dissentiente. Walmsley v. Griffith et al.*, 327.

2. The plaintiff on the sale of certain lands to the defendant R., left in her hands a sum of \$200 of the purchase money as security against an execution in another action then in the hands of the sheriff against the plain-

tiff's lands. Subsequently the plaintiff appealed in that action, and on doing so gave a bond with sureties conditioned to pay the debt and costs.

*Held*, (reversing the judgment of the Court below), that the giving of such bond operated as a supersedeas of the writ of execution, not as a stay thereof merely. *O'Donohoe v. Robinson et al.*, 622.

### VERDICT OF JURY.

The father of the plaintiff applied to the defendant company for a loan of \$2,500 secured by land valued by the company's appraiser at \$3,500. In answer to certain questions put to the applicant, in a printed form of application for loan, he stated himself to be the owner of certain horses, cows, sheep, and other stock. The plaintiff was present with his father at the time of making the application, but swore that he was not aware of the answers given by him as to his personal effects. The defendants sued and obtained execution against the father, under which they seized some of the stock in the possession of the son, who had been residing apart from his father, and from whom, prior to the above application, he had purchased it.

In an interpleader issue between the son and the company the jury found in favour of the claim of the former, which verdict the Judge of the County Court refused to set aside.

On appeal this Court, although they considered that a verdict for the defendants would have been more satisfactory, refused to disturb the judgment, the question being one proper for the decision of the jury. *Malcolmson v. Hamilton Provident and Loan Society*, 610.

### VESTING, PERIOD OF.

*See* WILL, &c., 1.

### WARRANT AND DEFEND ASSIGNEE, COVENANT TO.

*See* PATENT RIGHT.

### WARRANTY.

*See* SALE OF MACHINE.

### WHISTLE, NEGLECT TO SOUND.

*See* RAILWAY COMPANY.

### WILL, CONSTRUCTION OF.

A testator directed the trustees under his will to hold for accumulation the proceeds and income of his personal estate upon certain trusts. He also directed with reference to his real estate (with the exception of some land in Lindsay) that the income should, in the same manner as the income from his personal estate, form one fund until the death or second marriage of his widow and his youngest child should attain twenty-one, when the lands were to be sold and the proceeds held upon the same trusts as were declared concerning the personal estate, which were for the children named, in equal shares as tenants in common.

The will contained a provision that in the event of the death of any of the children, leaving issue, the share of the one so dying should be divided among the issue on their attaining twenty-one.

As to the lands in Lindsay, the will contained a power to the trustees to grant building leases for terms not exceeding twenty-one years, and he directed that, upon the happening of the double event above referred to, the trustees should hold and apply the rents in the same manner and proportions as theretofore limited with reference to the accumulations, and the dividends and income derived therefrom. The will further provided that in default of any of his grandchildren attaining majority, the proceeds of all his estate real and personal should be applied towards founding an institution in the City of Toronto for the dumb and blind :

*Held*, (reversing the judgment of PROUDFOOT, J., 1 O. R. 362), BURTON, J.A., dissenting, that the children took absolute vested interests on the happening of the double event.

*Per* BURTON, J.A., that they took only estates for life, with remainder to the grandchildren. *Re Charles—Fulton v. Whatmough*, 281.

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#### WRITTEN CONTRACT.

*See* SALE OF MACHINE.

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